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ALEXANDER L. STEVA
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No._____

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

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THE STATE OF TEXAS,

Appellant

V.

KVUE-TV, INC., ET AL.,

Appellees

• • •

On Appeal from
The United States Court of Appeals
for the Fifth Circuit

• • •

JURISDICTIONAL STATEMENT

• • •

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QUESTIONS PRESENTED

I. Can Congress preclude state regulation of state and local elections by enacting the Federal Election Campaign Act of 1971 without violating principles of Federalism?

II. By enacting the Federal Election Campaign Act of 1971, has Congress preempted state regulation of state and local elections?

PARTIES TO THE PROCEEDING

The Appellant the State of Texas was Intervenor-Defendant in the District Court and Appellee in the Court of Appeals.

Appellee Margaret Moore, in her official capacity as County Attorney for Travis County, Texas, was Defendant in the District Court and Appellee in the Court of Appeals.

Appellee KVUE-TV, Inc. was Plaintiff in the District Court and Appellant in the Court of Appeals.

Appellees Austin Broadcasting Corp. and Central Texas Broadcasting Co., Inc. were Intervenor-Plaintiffs in the District Court and Appellants in the Court of Appeals.

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JURISDICTIONAL STATEMENT

* * *

Appellant the State of Texas respectfully prays that this Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit which held a provision of the

Texas Election Code unconstitutional on the ground of preemption by federal statute.

REFERENCE TO REPORTS OF OPINIONS

The memorandum opinion and order of the United States District Court for the Western District of Texas was signed and entered March 18, 1982. The opinion was not published. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 709 F.2d 922.

STATEMENT OF GROUNDS OF JURISDICTION

KVUE-TV, Inc., Austin Broadcasting Corp., and Central Texas Broadcasting Co., Inc., (hereinafter "the Broadcasters") brought this action under 42 U.S.C. §1983 seeking declaratory and injunctive relief that Texas Election Code article 14.09(B)

was preempted by federal statute. Federal jurisdiction was based on 28 U.S.C. §1343. The District Court found that the case was not ripe for judicial review and dismissed it.

On July 18, 1983, the United States Court of Appeals for the Fifth Circuit reversed the judgment of the District Court. The court found that the case was justiciable and that the Texas statute was preempted by federal law.

The State of Texas filed its notice of appeal on September 23, 1983 in the United States Court of Appeals for the Fifth Circuit. Jurisdiction is conferred on this Court by 28 U.S.C. §1254(2).

STATUTORY PROVISIONS

Texas Election Code Ann.

art. 14.09(B) (Vernon Supp. 1982):

> Any advertising medium or any officer or agent thereof who willfully demands or receives for any political advertising any money or other thing of value in excess of the sum due for such service, or any person who pays or offers to pay for such service any money or other thing of value in excess of the sum due, or any person who pays or offers to pay any money or other thing of value for the publication or broadcasting of political advertising except as advertising or production matter, shall be fined not more than $100. No advertising medium may charge a rate for political advertising in excess of the following: (1) For advertising broadcast over a radio or television station, including a community antenna or cable television system, the rate charged shall not exceed the lowest unit charge of the station for the same class condition and amount of time for the same period.

Federal Election Campaign Act of 1971, 47 U.S.C. §315(b) (1976):

> The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election to such office shall not exceed--
> (1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and
> (2) at any other time, the charges made for comparable use of such station by other users thereof.

STATEMENT OF THE CASE

The touchstone of this case is the right of states to regulate state and local elections. Toward that end, the State of Texas enacted in 1975 the Texas Election Code. Article 14.09 of the statute requires broadcasters to charge political advertisers the same rate as their "most favored" commercial advertisers. The intent here was to promote an informed electorate by increasing public exposure of political candidates and issues. The Texas statute extended the protection already afforded political advertising by the Federal Election Campaign Act of 1971 in two ways: it guaranteed "most favored" rates for both candidate and issues advertising, while the federal law protected only candidate advertising; and it guaranteed "most

favored" rates year round, instead of the "window" periods of forty-five days before the primary and sixty days before the election provided by federal law.

In 1981, a local television station brought suit challenging that state law had been preempted by the Federal Act. After a non-jury trial on the merits, the District Court dismissed the Broadcasters' action on the ground that they had not satisfied the requirements of justiciability. The District Court further found that, if it were to consider the merits of the case, it would conclude that the state statute was preempted by federal law only with regard to elections of federal candidates.

The Broadcasters appealed to the United States Court of Appeals for

the Fifth Circuit. The Fifth Circuit found that although Congress did not intend to preclude state regulation of political advertising, the Texas statute had nonetheless been preempted by federal law because the state law stood as an obstacle to the achievement of Congress' purpose to limit campaign spending.

REASONS WHY QUESTIONS ARE SUBSTANTIAL

I. CONGRESS CANNOT PRECLUDE STATE REGULATION OF STATE AND LOCAL ELECTIONS.

It is difficult to conceive of a state interest more compelling than that of regulating its elective process. The Fifth Circuit's holding that states may not regulate their own elections because Congress has regulated federal elections is an affront to our federal system. See, National League

of Cities v. Usery, 426 U.S. 833, 855 (1976) ("Congress may not exercise (its) power so as to force directly upon the State its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made.").

In Oregon v. Mitchell, 400 U.S. 112 (1970), this Court held that the 18-year old vote provisions of the Voting Rights Act Amendments of 1970 were constitutional and enforceable insofar as they pertain to federal elections, and unconstitutional and unenforceable insofar as they pertain to state and local elections. In so holding, this Court recognized that:

> No function is more essential to the separate and independent existence of the States and their governments than the power to

> determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices.

Id. at 125 (emphasis added) (citations omitted). This Court concluded that:

> Our judgment today gives the Federal Government the power the Framers conferred upon it, that is, the final control of the elections of its own officers. Our judgment also saves for the States the power to control state and local elections which the Constitution originally reserved to them and which no subsequent Amendment has taken from them.

Id. at 134-135.

The State of Texas has enacted the Texas Election Code to provide maximum access to the public of political candidates and issues. The State's interest harmonizes perfectly with the primary purpose of

the Federal Election Campaign Act: to give political candidates access to the broadcast media to explain their stand on issues. KVUE v. Moore, 709 F.2d 922, 935 (5th Cir. 1983) (citations omitted). To the extent that Congress also intended to "limit the cost of campaigning for public office," id. at 935, that limitation can be properly applied only to federal elections. Regulation of state and local elections is reserved to the states and Congress has no legitimate interest in restricting the access to the public of politcal advertisers for state and local elections.

II. CONGRESS HAS NOT PREEMPTED STATE REGULATION OF STATE AND LOCAL ELECTIONS.

The Fifth Circuit correctly recognized that Congress did not intend to preclude state regulation of

political advertising. See, Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424 (1963). The Federal Election Campaign Act, itself, provides for preemption only for federal elections. 2 U.S.C. §453 provides:

> The provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office.

Thus, Congress has spoken clearly and directly on the question of federal preemption of state statutes. Congress intended to preempt state statutes "with respect to election to Federal office." Congress did not intend for the provisions of the Act to preempt state statutes regulating state and local elections.

Nevertheless, the Fifth Circuit finds preemption because state law is in "conflict" with federal law. Facially, there is no conflict between the Texas Election Code and the Federal Election Campaign Act. The federal statute requires that broadcasters may not charge more than the lowest unit charge to candidates for federal office for forty-five days before a primary and sixty days before an election. At all other times, candidates for federal office may not be charged more than a comparable charge. The state statute applies to candidate elections and to issue elections on a state and local level. It requires that broadcasters charge no more than the lowest unit charge for any such political advertising at any time. The two statutes coordinate beautifully.

Both have as their intent a policy of lowering the cost of political advertisting. The federal statute applies to the only type of elections that exist within the federal system--candidate elections. Because elections to federal office are on a much broader scale than most state or local elections, the federal statute was limited to a certain period of time for the lowest unit charge requirement. State and local elections, on the other hand, are not so broad in scope and may occur at various times during the year, and the Texas legislature accordingly provided for the lowest unit charge for all such advertising. The State's statute is neither repugnant to nor inconsistent with federal law.

Yet, the Fifth Circuit finds preemption because one purpose of the

Federal Act is to "limit the cost of campaigning for public office" and the Texas statute "encourages greater, rather than lesser, campaign spending by encouraging candidates--and others--to advertise year round." First, the Court's conclusion rests on a faulty assumption that lengthened campaign periods result in increased campaign spending. Whether a candidate advertises early in a campaign or later is a matter of campaign strategy and does not necessarily result in increased expenditures. Second, to the extend that increased access to the media is the primary goal of both state and federal law, the statutes are not in conflict.

Recently this Court reviewed the doctrine of preemption in the context of regulating nuclear power.

Pacific Gas and Electric Company v. State Energy Resources Conservation and Development Commission, ____ U.S. ____, 103 S.Ct. 1713 (1983). Even in a field of as great a national concern as nuclear power, this Court held that sufficient authority had been left to the states "to allow the development of nuclear power to be slowed or even stopped," although directly contrary to the purpose of the Atomic Energy Act to promote the use of nuclear power. Id. at 1732. Surely, here, where the state's interest in regulating its own elections is most compelling and the national interest in shortening the campaign season barely rational, preemption cannot be found.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the United States Court of Appeals for the Fifth Circuit and affirm the judgment of the District Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that three true and correct copies of the Jurisdictional Statement of the State of Texas have been served on all parties required to be served by depositing same in the United States Mail, certified, return receipt requested, on this the 14th day of October, 1983, addressed to:

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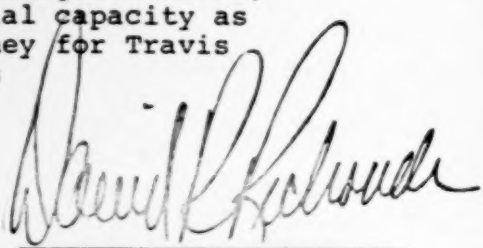

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APPENDIX

* * *

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APPENDIX

1. **Opinion of the United States Court of Appeals for the Fifth Circuit**

2. **Judgment of the United States Court of Appeals for the Fifth Circuit**

3. **Memorandum Opinion and Order of the District Court**

4. **Judgment of the District Court**

5. **Notice of Appeal**

6. **Text of Applicable Statutes**

APPENDIX A

KVUE, INC., Plaintiff-Appellant,

and

AUSTIN BROADCASTING CORP. and Central Texas Broadcasting Co., Inc.
Intervenors-Appellants,

V.

Margaret MOORE, In Her Official Capacity as County Attorney for Travis County, Texas,
Defendant-Appellee,

and

The State of Texas, Intervenor-Appellee,

No. 82-1192.

United States Court of Appeals, Fifth Circuit.

July 18, 1983

Television broadcaster sought declaration of constitutionality of Texas statute proscribing the rates which radio and television stations could charge political advertisers and requiring sponsors of such advertising to identify themselves. The United States District Court for the Western District of Texas, James Nowlin, J., dismissed for lack of standing, and broadcaster appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) broadcaster had suffered injury and therefore had standing and also presented a justiciable

controversy; (2) that portion of statute setting rates to be charged of political advertising was preempted as directly conflicting with federal law; (3) the sponsorship identification requirement was preempted as regard federal candidates or committees but was valid to extent it applied to candidates for nonfederal officers and campaigns that did not involve federal issues; and (4) sponsorship identification requirement did not violate the First Amendment.

Reversed and remanded.

1. Federal Courts — 12

To satisfy the "case or controversy" requirement for justiciability by a federal court, a dispute must be real, not hypothetical, and plaintiff must be personally affected and thus have standing to sue. U.S.C.A. Const. Art. 3, § 1 et. seq.

2. Federal Courts — 12

The case or controversy requirement forecloses federal court's consideration of moot cases, of abstract, hypothetical, and conjectural questions and of all matters save those involving parties who have real dispute about a matter in which their interests are genuinely adverse. U.S.C.A. Const. Art. 3, § 1 et seq.

3. Federal Courts — 12

Case or controversy requirement of federal justiciability focuses on the issues in the case rather than on the party seeking to present them. U.S.C.A. Const. Art. 3, § 1 et seq.

4. Federal Courts — 12

Difference between a justiciable case or controversy and an abstract question is one of degree and is not

discernable by any precise test but depends on, among other factors, imminence of the harm, adversariness of the parties' positions and reality of injury to the plaintiff. U.S.C.A. Const. Art. 3, § 1 et seq.

5. Federal Civil Procedure — 103

Rule that parties seeking relief in federal court must have standing to sue is closely related to the case or controversy requirement and it focuses on whether the plaintiff before the court is a proper party to sue rather than on the issues in the case. U.S.C.A. Const. Art. 3, § 1 et seq.

6. Federal Civil Procedure - 103

Whether a party has standing to sue is determined by ascertaining whether that party has alleged such a personal stake in the outcome of the controversy so as to assure that concrete adverseness which sharpens presentation of the issues. U.S.C.A. Const. Art. 3, § 1 et seq.

7. Federal Civil Procedure - 103

A plaintiff may establish standing to sue in federal court by demonstrating that his federal rights are jeopardized by action of a state. U.S.C.A. Const. Art. 3, § 1 et seq.

8. Constitutional Law - 42.1(3)

A litigant may not challenge constitutionality of state criminal statute merely because he desires to wipe it off the books or even because he may some day wish to act in a fashion that violates it. U.S.C.A. Const. Art. 3, § 1 et seq.

9. Constitutional Law — 42(2)

To have standing to invoke a federal trial court's jurisdiction; a litigant must demonstrate a realistic danger of sustaining a direct injury as result of the statute's operation or enforcement, but it is not necessary that the litigant first expose himself to actual arrest or prosecution to be entitled to challenge a statute which he claims deters the exercise of his constitutional rights. U.S.C.A. Const. Art. 3, § 1 et seq.

10. Federal Courts - 13

One who has violated a state law and has been charged with that offense will not be allowed to file suit in federal court to challenge constitutionality of the statute if the state permits him to raise the constitutional issue in proceedings pending in its court. U.S.C.A. Art. 3, § 1 et seq.

11. Constitutional Law - 42(2), 42.1(3)

One who seeks to challenge a state statute as violative of the Federal Constitution may not sue before he is truly injured, yet he may not wait until he is charged with a crime and he may invoke federal jurisdiction only if he can move through the narrow door between prematurity and exclusive state jurisdiction. U.S.C.A. Const. Art. 3, § 1 et seq.

12. Federal Courts — 752
Evidence — 48

Where State Attorney General had released formal opinion clarifying statute at issue in declaratory judgment action involving its constitutionality the Court of Appeals took judicial notice of that opinion and considered its effect, if any, on plaintiff's standing, without remanding the case for the district court's views.

13. Constitutional Law — 42.1(6), 46(1)

Television broadcast had standing to challenge constitutionality of Texas statutes prescribing rates which radio and television stations may charge political advertisers and requiring sponsors of such advertisement to identify themselves and broadcaster presented a live controversy between adverse parties where station suffered actual monetary losses during time it obeyed the law and it had violated statute since vacation of restraining order, several advertisers had filed written protests when station did not charge lowest unit rate and another inquired of county attorney's office what might be done and county attorney's concerns about statutory ambiguity were allayed by Attorney General's opinion. V.A.T.S. Election Code, art. 14.09(A, B); U.S.C.A. Const. Art. 3, § 1 et seq.

14. Federal Courts — 13

Fact that criminal statute at issue in declaratory judgment action challenging its constitutionality had not been enforced and that there was no certainty that it would did not establish lack of case or controversy as the state had not disavowed enforcement. U.S.C.A. Const. Art. 3, § 1 et seq.

15. Courts — 508(1)
Federal Courts — 46

Younger pertains to a stay of federal consideration because state proceedings are actually underway, whereas *Pullman* is based on the need to allow states to interpret their own statutes, if possible in a manner consonant with constitutional requirements, thereby relieving federal courts from unnecessarily confronting constitutional questions.

16. Federal Courts — 55

Federal court would not abstain from deciding constitutionality of Texas statute prescribing rates which radio and television stations could charge political advertisers until Texas courts had construed the allegedly ambiguous rate requirements as vice challenged was state regulation of political advertising rates not the specific rate and if the state could not constitutionally regulate the rate, neither proposed interpretation would save it. V.A.T.S. Election Code, art. 14.09(B).

17. Federal Courts — 46

Pullman abstention is employed only when state court determination would eliminate or substantially modify a federal constitutional question.

18. States — 4.13

Supremacy of federal law is patent when a state law conflicts directly with federal law and, in that event, the state law was invalid. U.S.C.A. Const. Art. 6, cl. 2.

19. States — 4.13

A conflict, within scope of supremacy clause, exists when compliance with both state and federal statutes is a physical impossibility or when state law stands as an obstacle to the accomplishment of Congress' purpose and objectives. U.S.C.A. Const. Art. 6, cl. 2.

20. States — 4.10

Even when a state law does not conflict with a federal law, it is invalid under the supremacy clause if Congress has preempted the area the state law seeks to regulate and Congress may do this in two ways: it may express

its intent to oust state legislation; or it may regulate a subject so pervasively that is occupies the field, leaving no room for state action. U.S.C.A. Const. Art. 6, cl. 2.

21. Commerce — 59

Congress' power to regulate radio and television broadcasting arises from the power to regulate commerce among the states. U.S.C.A. Const. Art. 1, § 8, cl. 3.

22. States — 4.13

If preempted, a complementary or supplementary state regulation is invalid as one directly conflicting with the federal scheme, for preemption forbids state regulation either to advance or retard the federal purpose. U.S.C.A. Const. Art. 6, cl. 2.

23. States — 4.10

Unless preemption is express, the test of preemption is whether the area requires national uniformity, there is evidence of congressional design to preempt the field, or the state statute actually and directly conflicts with the federal. U.S.C.A. Const. Art. 6, cl. 2.

24. States — 4.10

Federal intent to preempt must be clear and manifest. U.S.C.A. Const. Art. 6, cl. 2.

25. Telecommunications — 435

The equal time rule, which requires broadcasters permitting a legally qualified candidate for public office to use its facilities to afford equal time to all other candidates, is meant to facilitate political debate through the media. U.S.C.A. Art. 6, cl. 2.

26. States — 4.10

Preemption questions in the communications field must be answered by considering specific factors in each case. U.S.C.A. Art. 6, cl. 2.

27. Elections — 311
States — 4.10

Texas statute requiring sponsors of political advertisements to identify themselves is preempted by federal law to extent it seeks to regulate federal candidates or committees, notwithstanding that compliance therewith does not preclude federal compliance; however, requirement is valid to extent it regulates advertising concerning state elections and campaigns. V.A.T.S. Election Code, art. 14.09(A); Communications Act of 1934, § 317, 47 U.S.C.A. § 317, U.S.C.A. Const. Art. 6, cl. 2.

28. States — 4.10

If federal regulation preempts state law, the state may not legislate even to compliment federal enactments. U.S.C.A. Const. Art. 6, cl. 2.

29. States — 4.13
Telecommunications — 384

Texas statute providing that for all political advertising, both candidate and issue advertising, a broadcaster can never charge more than the lowest unit charged of the station for the same class, condition and amount of time for the same period conflicts directly with federal law and is therefore preempted. V.A.T.S. Election Code, art. 14.09(B); U.S.C.A. Const. Art. 6, cl. 2; Communications Act of 1934, §§ 315, 315(b)(1), 47 U.S.C.A. §§ 315, 315(b)(1).

30. Telecommunications — 448

Purpose of federal statute requiring broadcasters to charge the lowest unit rate for political advertising 45 days before primary and 60 days before general election is to give political candidates access to broadcast media to explain their stand on issues and to limit cost of campaigning for public office. Communications Act of 1934, §§ 315, 315(b)(1), 47 U.S.C.A. §§ 315, 315(b)(1).

31. Constitutional Law — 90.1(9)
Elections — 311

Texas statute requiring that sponsors of political advertisements identify themselves did not violate First Amendment, and even if identification requirement infringed on broadcaster's First Amendment rights, the infringement was of an extremely limited nature, i.e., addition of words "paid political announcement" and sponsor's address, and the state's interest in such disclosure was compelling. U.S.C.A. Const. Amend. 1; V.A.T.S. Election Code, art. 14.09(A).

R. James George, Jr., David H. Donaldson, Jr., Austin, Tex., for plaintiff-appellant.

Erwin G. Krasnow, Washington, D.C., amicus curiae for Nat. Ass'n of Broadcasters.

James W. Collins, James Rader, Asst. County Attys., Austin, Tex., for Moore.

Margaret S. McGloin, Asst. Atty. Gen., for the State of Tex.

Appeal from the United States District Court for the Western District of Texas.

Before RUBIN, GARZA, and WILLIAMS, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

A television broadcaster challenges the constitutionality of a Texas statute prescribing the rates radio and television stations may charge political advertisers and requiring sponsors of such advertising to identify themselves. The district court found that the broadcaster had not been threatened with prosecution and dismissed the complaint for lack of standing to challenge the statute. We conclude that the broadcaster has suffered injury as a result of enactment of the statute and, therefore, presents us with a justiciable controversy.

On the merits, we conclude that the portion of the Texas statute setting the rates that may be charged for political advertising is unconstitutional because it conflicts directly with federal law and is, therefore, preempted. We conclude, however, that the sponsorship identification requirement is valid to the extent it applies to candidates for nonfederal office and campaigns that do not involve federal issues.

I.

Article 14.09(B) of the Texas Election Code prohibits a radio or television station from charging a rate for political advertising that exceeds the lowest unit charge made by the station to other advertisers "for the same class, condition and amount of time."[1] This statute ap-

1. Tex.Elec.Code Ann. art 14.09(B) (Vernon Supp. 1982) provides:

> (B) Any advertising medium or any officer or agent thereof who willfully demands or receives for any political advertising any money or other thing of value in excess of the sum due for such service, or any person who pays or offers to pay for such service any money or other thing of value in excess of the sum due, or any person who pays or offers to pay any money or other thing of value for the publication or broadcasting of political advertising except as advertising or production matter, shall be fined not more than $100. No advertising medium

(footnote continued on following page)

plies both to advertising in support of and in opposition to a particular candidate (candidate advertising) and to broadcasts for or against political issues (issue advertising). Article 14.09(A) prohibits the broadcast of either candidate or issue advertising that does not disclose the name and address either of the agent who contracted for the broadcast or of the person represented.[2] Violation of each section is a crime, punishable by sanction fixed by the statute.[3]

KVUE-TV, Inc. (KVUE) sued the county attorney for Travis County seeking a declaratory judgment that both provisions violate the United States Constitution and an injunction preventing enforcement of the

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(footnote continued from previous page)

> may charge a rate for political advertising in excess of the following:
>
> > (1) For advertising broadcast over a radio or television station, including a community antenna or cable television system, the rate charged shall not exceed the lowest unit charge of the station for the same class, condition and amount of time for the same period.

2. Tex.Elec.Code Ann. art 14.09(A) (Vernon Supp. 1982) provides:

> (A) It is unlawful for any person knowingly to enter into a contract or transaction to print, publish or broadcast, any political advertising which does not disclose thereon that it is political advertising and which does not state thereon the name and address either of the agent who personally entered into the contract or transaction with the printer, publisher, or broadcaster, or the person represented by such agent. A violation of this provision shall constitute a class A misdemeanor.

3. The penalty for violating 14.09(B), as noted in footnote 1, is a fine of not more than $100. The penalty for violating 14.09(A) is set by Tex.Penal Code Ann. § 12.21 (Vernon 1974): (1) a fine not to exceed $2,000; (2) confinement in jail not to exceed one year; or (3) both fine and imprisonment.

statutes. It asserted that both portions of the statute abridge its right to freedom of expression, safeguarded by the first amendment, expanded by the fourteenth to protect against state action, and that, because there is federal legislation concerning the same subject, the statute violates the supremacy clause of the Constitution. The State of Texas intervened to support Ms. Moore's position, arguing first that KVUE has not been injured and, therefore, lacks standing to challenge the statute; second, that if KVUE has standing, the federal courts should abstain until the statute is interpreted by a Texas court; and, finally, that the law is constitutional. We discuss these issues in turn.

II.

[1] Article III of the Constitution imposes limits on the cases federal courts may hear. This includes the requirement, broadly described as the jusiticiability doctrine, that there be a "case or controversy." The very use of the terms "case or controversy" implies that the dispute must be real, not hypothetical, and that the plaintiff must be personally affected and thus have standing to sue.

[2] Almost two centuries ago, the Supreme Court declined on this basis to give advice to President George Washington, whose request was transmitted by Thomas Jefferson, because no actual controversy was involved and the President sought only guidance.[4] The case or controversy requirement also forecloses our consideration of moot cases,[5] of abstract, hypothetical, and con-

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4. *See* P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, The Federal Courts and the Federal System 64 (2d ed. 1973).

5. *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 & n.3, 84 S.Ct. 391, 394 & n.3, 11 L.Ed.2d 347, 351 & n.3 (1964); *see United States v. Johnson*, 319 U.S. 302, 63 S.Ct. 1075, 87 L.Ed. 1413 (1943) (per curiam) (collusive case).

jectural questions,[6] and, indeed, of all matters save those involving parties who have a real dispute about a matter in which their interests are genuinely adverse. We consider whether KVUE's case meets these requirements.

A. Case or Controversy

[3,4] The basic inquiry in determining whether a case or controversy exists is whether the "conflicting contentions of the parties...present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract."[7] Thus the requirement focuses on the issues in the case rather than on the party seeking to present them. The difference between a case or controversy and an abstract question is, however, one of degree and "is not discernable by any precise test."[8] It depends on, among other factors, the imminence of the harm, the adversariness of the parites' positions, and the reality of injury to the plaintiff.

B. Standing

[5-8] The rule that parties seeking relief in federal court must have standing to sue is closely related to the case or controversy requirement. It focuses on whether the plaintiff before the court is a proper party to sue rather than on the issues in the case. We determine whether a party has standing to sue by ascertaining

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6. *See Muskrat v. United States*, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246 (1911).

7. *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93, 65 S.Ct. 1483, 1487, 89 L.Ed. 2072, 2076 (1945).

8. *Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 297, 99 S.Ct. 2301, 2308, 60 L.Ed.2d 895, 906 (1979).

whether it has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of [the] issues...."[9] A plaintiff may establish standing to sue in federal court by demonstrating that his federal rights are jeopardized by the action of a state. However, "persons having no fears of state prosecution except those that are imaginary or speculative ...." lack standing.[10] A litigant may not, therefore, challenge the constitutionality of a state criminal statute merely because he desires to wipe it off the books or even because he may some day wish to act in a fashion that violates it.[11]

[9] To invoke a federal trial court's jurisdiction, a litigant "must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement."[12] But "it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights."[13]

[10,11] On the other hand, one who has violated a state law and has been charged with that offense will not be allowed to file suit in a federal court to challenge the

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9. *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663, 678 (1962).

10. *Younger v. Harris*, 401 U.S. 37, 42, 91 S.Ct. 746, 749, 27 L.Ed.2d 669, 674 (1971); *see Boyle v. Landry*, 401 U.S. 77, 81, 91 S.Ct. 758, 760, 27 L.Ed.2d 696, 700 (1971).

11. *Cf. City of Los Angeles v. Lyons*, _____U.S._____, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (standing to seek injunctive relief not conferred by injury when possibility of its repetition remote).

12. *Babbitt*, 442 U.S. at 298, 99 S.Ct. at 2308, 60 L.Ed.2d at 906.

13. *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 1216, 39 L.Ed.2d 505, 514 (1974).

constitutionality of the statute if the state permits him to raise the constitutional issue in the proceeding pending in its court.[14] A federal decision at that juncture would interfere with the state's criminal process. Thus, one who seeks to challenge a state statute as violative of the federal constitution may not sue before he is truly injured; yet he may not wait until he is charged with a crime. He may invoke federal jurisdiction only if he can move through the narrow door between prematurity and exclusive state jurisdiction.

C. KVUE's Position

Our inquiry cannot always turn on either the "standing" or the "case or controversy" requirement alone. The concepts are sometimes so interrelated that the determination can be made only by considering both. For example, in *Younger*, the Court held that three of the four plaintiffs, who had never been arrested, indicted, or even threatened with prosecution, lacked standing to sue because their complaint alleged only that they felt "inhibited" in their desire to distribute handbills by the statute they challenged. This fear, the Court held, was "imaginary or speculative." 401 U.S. at 42, 91 S.Ct. at 749, 27 L.Ed.2d at 674. As to them the Court focused attention on the standing aspect of justiciability, not on the existence of a controversy. The fourth

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14. *Younger*, 401 U.S. at 49, 91 S.Ct. at 753, 27 L.Ed.2d at 678-79; *see Samuels v. Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971); *Perez v. Ledesma*, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971).

15. Because there is no ongoing state proceeding of any sort, we need not be concerned with the "abstention" branch of *Younger*. *See generally Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, _____U.S._____, _____ & n. 14, 102 S.Ct. 2515, 2523 & n. 14, 73 L.Ed.2d 116, 127 & n. 14 (1982); *Hicks v. Miranda*, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975).

plaintiff, who was actually being prosecuted in state court, had an obvious "controversy" with the state, *id.* at 41, 91 S.Ct. at 749, 27 L.Ed.2d at 673,[15] but was required nonetheless to present his constitutional argument in the criminal proceeding in state court.

In *Steffel*, however, the Court found an actual controversy because the plaintiff had been twice warned to stop distributing handbills and had been told that, if he continued to pass out the leaflets, he would likely be prosecuted. In addition, his handbilling companion had been prosecuted. The Court stated that this evidence was "ample demonstration that petitioner's concern with arrest has not been 'chimerical.' In these circumstances, it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." 415 U.S. at 459, 94 S.Ct. at 1215-16, 39 L.Ed.2d at 514 (citation omitted). It was not necessary for the plaintiff to allege or demonstrate irreparable injury.[16]

In *Babbitt*, the Court considered a challenge to several provisions of a statute affecting the plaintiffs' conduct. The Court posed two situations: first, a case in which the plaintiff "allege[s] an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [in which] there exists a credible threat of prosecution...."; second, a case in which plaintiffs " 'do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible....' "[17] In

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16. *See also Doran v. Salem Inn*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975).

17. 442 U.S. at 298-99, 99 S.Ct. at 2309, 60 L.Ed.2d at 906 (quoting *Younger*, 401 U.S. at 42, 91 S.Ct. at 749, 27 L.Ed.2d at 674).

the former instance, the Court stated, the plaintiff need not wait for the state to inititate criminal proceedings in order to secure relief; in the latter, the plaintiffs "do not allege a dispute susceptible to resolution by a federal court." 442 U.S. at 299, 99 S.Ct. at 2309, 60 L.Ed.2d at 906-907.[18]

KVUE charged the advertising rates required by the statute until October 1981, losing some $2,300 in revenue in 1980 and $2,100 in 1981. It filed suit on October 29, 1981, and obtained a temporary restraining order preventing enforcement of the statute. Until November 17, 1981, when the restraining order was vacated, it charged rates greater than § 14.09(B) permits, and, during this period at least, suffered no loss of revenue as a result of the statute.

The state and county assert that KVUE also lacks standing because it has no real basis for apprehending that it will be prosecuted for charging rates in excess of those permitted by the statute. County Attorney Margaret Moore testified that she had not threatened KVUE with prosecution because she had not received a complaint, but had only advised people what information she would require before undertaking a prosecution. She stated that she did not anticipate prosecuting KVUE but would not issue "advisory opinions" about the likelihood of a prosecution without having a "set of facts" before her. She referred to the ambiguous language of Article 14.09(B), which might conceivably authorize the political advertising rates presently charged by KVUE and stated:

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18. In *Babbitt*, the Court's analysis focused on whether there was a case or controversy. Its discussion indicated that the standing requirement merged with the necessity for a case or controversy. *See* 442 U.S. at 299 & n. 11, 99 S.Ct. at 2309 & n. 11, 60 L.Ed.2d at 907 & n.11.

> This statute ... has some problems in it, ... and I'll be honest with you, I would be hard pressed to prosecute anyone under that statute without some sort of clarification as to a number of different items. In other words, there are a number of problems in there for a prosecutor if you are really going to talk about putting a case together, so it's safer for me to say I'm not going to prosecute anyone than it is to say I am given the situation at this time.

[12] The Attorney General of Texas has since released a formal opinion clarifying the statute. *See* Op.Tex.Att'y Gen. MW-488 (July 7, 1982). We take judicial notice of this opinion and consider the effect, if any, of the Attorney General's opinion on KVUE's standing without remanding the case for the district court's views.[19]

The district judge concluded that the County Attorney's testimony "would clearly allay any reasonable fear of prosecution." We do not find the testimony so reassuring even without the clarification provided by the Attorney General's opinion.

The threat to KVUE looms between the chimerical apprehension that the *Younger* court labeled too unreal to warrant litigation and the fear that the *Steffel* Court treated as sufficiently real to warrant judicial consideration. The station alleges that it desires to violate the statute and has demonstrated that the county attorney, pursuant to her statutory duty to enforce the law and despite her concerns about the statute's possible am-

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19. *See Middlesex County Ethics Comm.*, _____U.S. at _____, 102 S.Ct. at 2523-24, 73 L.Ed.2d at 126-27 (considering event occurring after court of appeals' decision but before filing of petition for certiorari in deciding whether *Younger* abstention required).

biguity, would not rule out prosecution. The county attorney's concerns about the statute's ambiguity should indeed have been allayed by the Attorney General's opinion, creating the likelihood that this would no longer be a deterrent. Furthermore, the possibility that an advertiser may file a complaint with the county attorney is not entirely suppositious. Several advertisers filed written protests with KVUE when it did not charge the lowest unit rate and another inquired of the county attorney's office what might be done, testifying that he would at least consider filing a complaint to settle the question.

[13] In addition, KVUE offered evidence that it suffered actual monetary losses during the time it obeyed the law and that it has in fact violated the statute since vacation of the restraining order. The combination of these facts persuades us that KVUE has standing to sue and has presented us with a live controversy between adverse parties.

The threat is more immediate than that held insufficient to confer standing in *City of Los Angeles v. Lyons*, _____U.S._____, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). In *Lyons*, the Supreme Court held that a person who had been once subjected to an allegedly illegal chokehold lacked standing to seek an injunction barring the future use of such chokeholds. The Court stated: "That [the plaintiff] may have been illegally choked by the police on October 6, 1976 ... does nothing to establish a real and immediate threat that he [will] again be stopped ... by an officer ... who [will] illegally choke him into unconsciousness without any provocation or resistance on his part." *Id.* at _____, 103 S.Ct. at 1667, 75 L.Ed.2d at 686.

KVUE has suffered actual financial loss as a result of the enforcement of the statutes. Should we refrain from deciding the case, KVUE will have to comply with the

law and suffer a loss of revenue or defy it and face the likelihood of prosecution. Therefore, this case is not controlled by *Lyons;* it is more like *Kolender v. Lawson,* _____U.S._____, _____ n.3, 103 S.Ct. 1855, 1857 n. 3, 75 L.Ed.2d 903, 908 n.3 (1983), in which the Court held that a plaintiff stopped by police 15 times in two years had standing because of the existence of a "credible threat" that he might again be detained.[20]

[14] That the statue has not been enforced and that there is no certainty that it will be does not establish the lack of a case or controversy. The state has not disavowed enforcement. As the Court stated in *Babbitt:*

> [W]hen fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative a plaintiff need not "first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute." The ... criminal penalty provision applies in terms to "[a]ny person ... who violates any provision" of the Act. Moreover, the State has not disavowed any intention of invoking the criminal penalty provision against [the plaintiffs]. Appellees are thus not without some reason in fearing prosecution .... In our view, the positions of the parties are sufficiently adverse with respect to the ... provision ... to present a case or controversy within the jurisdiction of the District Court. 442 U.S. at 302, 99 S.Ct. at 2310-11, 60 L.Ed.2d at 909 (citations and footnote omitted).

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20. *See also United States v. Grace,* _____U.S._____, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) (petitioner had standing to challenge statute forbidding picketing at Supreme Court building after twice being told to cease handing out leaflets on pain of arrest).

III.

[15-17] The existence of a "case" in the constitutional sense being established, we consider its merits. Article 14.09(B) requires broadcasters to charge the "lowest unit charge ... for the same class, condition and amount of time for the same period."[21] Texas contends, plausably indeed, that on its face the statute may be read to require the charge to be the lowest rate charged any advertiser, thus entitling political advertisers to bulk rates, or it may be read more narrowly, limiting the charge levied on political advertisers to the rate quoted regular commercial advertisers who buy in the same quantity as the political advertisers. The state, therefore, contends that we should abstain from deciding the constitutional question until the Texas courts construe the statute.[22]

This argument fails without regard to whether the statute is ambiguous because it may be equally unconstitutional under either interpretation. The vice challenged there is Texas' regulation of political advertising rates, not the specific rate fixed. If the state may not constitutionally regulate the rate to be charged, neither interpretation will save the statute. We employ *Pullman* abstention only when the state court's determination "will eliminate or substantially modify a federal con-

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21. The statute is set forth in full *supra* at note 1.

22. This argument is not based on the type of abstention required by *Younger*, staying federal consideration because state proceedings are actually underway, for there are no state proceedings of any kind. It seeks instead the type of abstention discussed in *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), which is based on the need to allow states to interpret their own statutes, if possible in a manner consonant with constitutional requirements, thus relieving federal courts from unnecessarily confronting constitutional questions.

stitutional question."[23] Here, the question is whether, regardless which construction of the statute the state may adopt, the federal statute and regulations prevent Texas from legislating in this field.

IV.

[18-24] The United States Constitution gives primacy to laws enacted by the Congress as the "supreme law of the land." U.S. Const. art. VI, § 2. This supremacy is patent when a state law conflicts directly with a federal law.[24] In that event the state law is invalid. Even when a state law does not conflict with a federal law, it is invalid if Congress has preempted the area the state law seeks to regulate. Congress may do this in two ways: it may express its intent to oust state legislation, or it may regulate a subject so pervasively that it occupies the field, leaving no room for state action.[25] If preempted, a complementary or supplementary state regulation is as

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23. *Brooks v. Walker County Hospital Dist.*, 688 F.2d 334, 336 (5th Cir. 1982), *cert. denied*, _____U.S._____, 103 S.Ct. 2452, 75 L.Ed.2d _____ (1983); *see Palmer v. Jackson*, 617 F.2d 424 (5th Cir. 1980).

24. *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158, 98 S.Ct. 988, 994, 55 L.Ed.2d 179, 188 (1978). Such a conflict exists when compliance with both the state and federal statutes is a physical impossibility or when state law stands as an obstacle to the accomplishment of Congress' purposes and objectives. *Id.*

25. *See Fidelity Savings & Loan Ass'n v. De la Cuesta*, _____U.S._____, _____, 102 S.Ct. 3014, 3022-23, 73 L.Ed.2d 664, 674-76 (1982) (and cases cited therein); *Note, Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 Stan.L.Rev. 208 (1959).

Congress' power to regulate radio and television broadcasting arises from the power to regulate commerce among the states. U.S. Const. art. I, § 8, cl. 3; *United States v. Southwestern Cable Co.*, 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968).

invalid as one directly conflicting with the federal scheme, for preemption forbids state regulation either to advance or to retard the federal purpose.[26] Unless preemption is express, the test of preemption is whether (1) the area requires national uniformity,[27] (2) there is evidence of congressional design to preempt the field,[28] or (3) the state statute actually and directly conflicts with the federal. Because the federal statutes do not expressly forbid state regulation, we review the regulatory scheme to determine whether it preempts state legislation in any other fashion.

A. *Federal Regulation of Advertising*

[25] Federal regulation of broadcasting, whether by radio or television, is comprehensive. By the Communications Act's licensing provision federal law governs who may broadcast and over what frequencies. Under that statute and the regulations adopted pursuant to it, broadcast licenses may be issued only after the Federal Communications Commission (FCC) determines that issuance is in the public interest.[29] Licensees'

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26. *Campbell v. Hussey*, 368 U.S. 297, 82 S.Ct. 327, 7 L.Ed.2d 299 (1961); *see Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 229-230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447, 1459 (1947).

27. *See Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 143-44, 83 S.Ct. 1210, 1218, 10 L.Ed.2d 248, 256 (1963).

28. *See id.* at 142, 83 S.Ct. at 1217, 10 L.Ed.2d at 256. The federal intent to preempt must be "clear and manifest." *Ray*, 435 U.S. at 157, 98 S.Ct. at 994, 55 L.Ed.2d at 188; *see Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604, 613 (1977)("unmistakably ordained").

29. *See* 47 U.S.C. § 309 (1976). The FCC's explication of the public interest requirement has established standards that broadcasters must meet to renew or secure a license. *See* Note, *The Changing Face of Broadcaster Responsibility Under the Public Interest Standard*, 10 Loy. U.Chi.L.J. 115 (1978).

broadcasting discretion is subject to a number of important limits such as the personal attack rule,[30] the fairness doctrine,[31] the prime-time access rule,[32] and the equal opportunity rule.[33] Federal regulations also govern billing for media advertising,[34] refusal to sell advertising time,[35] sponsorship information,[36] alcoholic beverage advertising,[37] amounts of commercial time,[38] penalties for false, misleading, or deceptive advertising,[39] loudness of commercials,[40] and the number of commercials permitted during a given program.[41]

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30. *See id.;* 47 C.F.R. § 73.1920 (1981).

31. *See* 47 U.S.C. § 315(a) (1976); 47 C.F.R. § 73.1910 (1981); *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act,* 48 F.C.C.2d 1, 2-3 (1974).

32. *See* Note, *supra* note 29, at 130; 47 C.F.R. § 73.658(k) (1981).

33. *See* 47 U.S.C. § 315(a) (1976). The equal time rule is meant to facilitate political debate through the media, *see Farmers Educational & Coop. Union v. WDAY, Inc.,* 360 U.S. 525, 79 S.Ct. 1302, 3 L.Ed.2d 1407 (1959), and requires broadcasters permitting a legally qualified candidate for public office to use its facilities to afford equal time to all other candidates for that office.

34. 47 C.F.R. § 73.1205 (1981).

35. *Id.* § 73.4005.

36. *Id.* § 73.1212.

37. *Id.* § 73.4015.

38. *Id.* §§ 73.4010, 0.281(a)(7).

39. *Id.* § 73.4070.

40. *Id.* § 73.4075.

41. *Id.* § 73.4080.

[26] This comprehensive regulatory scheme does not, however, enterely bar state from legislating in the broadcast field. Thus in *Head v. New Mexico Board of Examiners*, 374 U.S. 424, 83 S.Ct. 1759, 10 L.Ed.2d 983 (1963), the Supreme Court upheld the constitutionality of a state statute forbidding price advertising by optometrists. Recognizing the comprehensive nature of federal regulation under the Communications Act, the Court nevertheless held that preemption questions in the communications field must be answered by considering the specific factors in each case. The Court noted: "[s]tatements concerning the 'exclusive jurisdiction' of Congress beg the only controversial question: whether Congress intended to make its jurisdiction exclusive." *Id.* at 430, 83 S.Ct. at 1763, 10 L.Ed.2d at 988. The Court held that the state statute was not preempted because Congress "could not have intended its grant of authority to supplant all the detailed state regulation of professional advertising practices...." *Id.* at 431, 83 S.Ct. at 1764, 10 L.Ed.2d at 989. We must, therefore, inquire whether Congress intended its regulation of and grant of authority to the FCC over *political* advertising to oust state regulation.

B. *Federal Regulation of Political Advertising*

Congress has enacted legislation regulating both the permissible price for candidate advertising and the required identification of sponsors of political broadcasting. The Federal Election Campaign Act of 1971 amended the Communications Act to provide that broadcasters must sell political candidates time at "the lowest unit charge of the station for the same class and amount of time for the same period..." during the 45 days before a primary election and 60 days before a

general election.[42] At all other times the broadcasters must sell time at charges made for comparable use of the time by nonpolitical advertisers.[43] Congress authorized the FCC to promulgate regulations implementing the statute, which the FCC has done.[44]

C. *Sponsorship Identification*

The statute neither regulates all types of political advertising nor manifests any intention to occupy the

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42. 47 U.S.C. § 315(b)(1976). The statute provides:

> (b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election to such office shall not exceed—
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> (1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and
>
> (2) at any other time, the charges made for comparable use of such station by other users thereof.

The FCC has devoted considerable attention to defining "lowest unit charge." *See, e.g., Law of Political Broadcasting & Cablecasting*, 69 F.C.C.2d 2209, 2273—81 (1978) [hereinafter cited as *Law of Political Broadcasting*]; *Use of Broadcast & Cablecast Facilities by Candidates for Public Office*, 34 F.C.C.2d 510, 524-33 (1972) [hereinafter cited as *Use of Broadcast & Cablecast Facilities*].

43. The FCC has extensively defined "comparable use." *See Use of Broadcast Facilities by Candidates for Public Office*, 24 F.C.C.2d 832, 877-83 (1970), *reaffirmed in Use of Broadcast & Cablecast Facilities, supra* note 42, at 533. *See also law of Political Broadcasting, supra* note 42, at 2281-86.

44. *See* 47 C.F.R. §§ 73.1940, 76.205 (1981).

political advertising field. Nor does the legislative history suggest that Congress intended entirely to preclude state regulation of political advertising. The FCC has, however, apparently expressed the view that the sponsorship requirements preempt state law in part.[45] In a joint statement, the Commission and the Federal Election Commission have informed broadcast licensees how to comply with the sponsorship identification requirement. After listing a number of approved sponsorship announcements, the two commissions stated: "The notice requirements of the FECA and the FEC Rules supersede and preempt any state statute which attempts to impose additional notices on political advertising by Federal candidates or committees."[46]

The FEC and FCC requirements are not identical. The FEC rules apply to candidates, their committees, and others buying political broadcast time. The announcements required are designed to reveal whether a commercial is authorized by a candidate.[47] The FCC rules apply to broadcast licenses. They are designed to satisfy § 317 of the Communications Act, which "states that when a station is paid to broadcast *anything*, [it] must announce that the broadcast is paid for and who paid for it."[48]

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45. Congress has not enacted a separate requirement for identification of sponsors of broadcast political advertising, but has instead relied on the general sponsor identification requirement applicable to all advertising. *See* 47 U.S.C. § 317 (1976); 47 C.F.R. § 73.1212 (1981).

46. *Joint Agency Guidelines for Broadcast Licensees re Political Broadcasting*, 69 F.C.C.2d 1129, 1131 (1978) (footnotes omitted) [hereinafter cited as *Joint Agency Guidelines*].

47. *Law of Political Broadcasting*, *supra* note 42, at 2304-05.

48. *Id.* at 2302 (emphasis added).

[27, 28] Although the expression of intent to preempt does not expressly apply to the FCC's identification-of-sponsorship rules, it appears in a statement coauthored by the FCC and listing sponsorship identifications complying with § 317 and the regulations. The statement expresses federal intent to preempt the imposition by states of additional notice requirements on political advertising by federal candidates. Thus, it is sufficient to invalidate the Texas statute to the extent that the law seeks to regulate federal candidates or committees.[49]

Patently the FCC does not seek to control sponsorship identification by state candidates or committees. The Texas sponsorship requirement is, therefore, valid to the extent that it regulates such advertising concerning state elections and campaigns. There is no direct conflict between the federal sponsorship requirements and Texas' requirement. It is not physically impossible to comply with both laws; indeed, compliance with the Texas statute satisfies the federal requirement.[50] Nor

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49. *See New York State Comm'n on Cable Television v. FCC*, 669 F.2d 58 (2d Cir.1982); *Brookhaven Cable TV v. Kelly*, 573 F.2d 765 (2d Cir.1978), *cert. denied*, 441 U.S. 904, 99 S.Ct. 1991, 60 L.Ed.2d 372 (1979).

50. If the broadcast is authorized and financed by a candidate or committee, the federal requirement is satisfied by the statement: "Paid for by [name of candidate or committee]." *Joint Agency Guidelines*, *supra* note 46, at 1130; *see also In re Notice to Canadian River Broadcasting Co.*, 68 F.C.C.2d 1491, 1491 (1978) (sponsorship identification requirement violated by commercial identified as "paid for by concerned citizens"); *Applicability of Sponsorship Identification Rules*, 53 F.C.C.2d 368, 368 (1975) (statement that commercial is "paid political announcement" violates identification rule); *In re Liability of Zion-Benton Broadcasting Corp.*, 43 F.C.C.2d 633, 633 (1973); *see generally In re Amendment of the Commission's Sponsorship Identification Rules*, 52 F.C.C.2d 701 (1975). The Texas statute requires in addition the candidate's or committee's address and the notation that the commercial is a paid political announcement. The fact that Texas compliance does not preclude

(footnote continued on following page)

does the Texas statute obstruct the federal purpose. The federal statute is meant to require identification of sponsors in a way that viewers can comprehend.[51] The Texas statute furthers rather than obstructs Congress' goal.

When "the federal requirements [do] not regulate every aspect of [the] area, the state ha[s] the implied reservation of power to fill out the scheme."[52] State regulation is preempted only if the federal rules occupy the entire field or directly conflict with hence denying, state authority. Texas may, under the circumstances, and a requirement to the federal pattern.

D. *Rate Regulation*

[29, 30] By contrast, neither Congress nor the FCC has taken the position that the advertising rate provisions of § 315 oust states from regulating the price stations may charge for broadcasting political advertising. The federal statute requires that broadcasters charge the lowest unit rate 45 days before the primary and 60 days before the general election. 47 U.S.C. § 315(b)(1). A comparable use rate applies for the remainder of the year. 47 U.S.C. § 315(b)(2).[53] The FCC has stated that the federal

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(footnote continued from previous page)

federal compliance, however, does not validate its application to federal candidates. As pointed out above, if federal regulation preempts state law, the state may not legislate even to complement federal enactments.

51. *See Application of Sponsorship Identification Rules to Political Broadcasts, Teaser Announcements, Governmental Entities & Other Organizations*, 66 F.C.C.2d 302, 304 (1977).

52. *Smith v. Pingree*, 651 F.2d 1021, 1025 (5th Cir. 1981); *see Pharmaceutical Society of New York, Inc. v. Lefkowitz*, 586 F.2d 953, 958 n. 6 (2d Cir. 1978).

53. *See supra* notes 42-43.

statute "of course applies to *all* legally qualified candidates for public office, and not merely Federal candidates."[54] The statutory language supports that interpretation and we find it persuasive.[55]

Before Congress amended § 315 the statute simply provided that candidates were entitled to comparable rates at all times. The 1971 amendments added § 315(b)(1), requiring broadcast licensees to offer political advertisers the lowest unit rate within a 45-day "window" of the primary and a 60-day "window" of the general election. Congress' overriding purpose in adding § 315(b)(1) was to put political advertisers on par with ordinary commercial advertisers. Candidates are, therefore, "entitled to discounts, frequency and otherwise, offered to a station's most favored commercial advertiser for the same class and amount of time for the same period, *without regard to frequency of use by the candidate.*"[56] Thus, for example, a candidate is entitled to a rate based on a "package" or "plan" published on the station's rate card even if, during the rele-

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54. *In re Public Notice Concerning Licensee Responsibility Under Amendments to the Communications Act Made by the Federal Election Campaign Act of 1971*, 47 F.C.C.2d 516, 518 (1974) (emphasis added); *see In re Amendment of Parts 73 & 76 of the Commission's Rules Relating to Broadcasts & Cablecasts by Legally Qualified Candidates for Public Office*, 68 F.C.C.2d 1049 (1978)(any person who has publicly announced intention to run for any public office is covered by statute).

55. Section 315(b) applies to any person who is "a legally qualified candidate for *any public office.*" (emphasis added). When Congress wished to limit its regulation to candidates for federal office, it said so explicitly. *See, e.g.*, 47 U.S.C. § 312(a)(7) (1976); 2 U.S.C. § 431(2) (Supp. V 1981).

56. *In re Request by Station WBGR*, 58 F.C.C.2d 980, 980 (1976) (emphasis in original).

vant "window period, no commercial advertiser purchased the "package."[57]

Congress sought to place candidates on equal footing with a station's most favored commercial advertisers. Because "a political candidate's broadcast requirements are limited in terms of weeks or a few months at best ... he cannot avail himself of the favorable rates available to commercial advertisers who usually buy time in bulk for longer periods."[58] The FCC has recognized that the addition of § 315(b)(1) had a two-fold purpose: to give political candidates access to the broadcast media to explain their stand on issues and to limit the cost of campaigning for public office.[59] Congress' expression of the latter purpose makes clear its determination that candidate access to the media at extremely low cost should be permitted only during a limited "window" period. It stated: "The Committee is also persuaded that *a limitation on the length of time when this most favored rate is available will be an incentive to candidates to shorten the duration of their campaigns,* thereby helping to reduce campaign costs. Accordingly, the legislation provides that the lowest unit rate will *only* be available forty-five days before a primary election and sixty days

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57. *Use of Broadcast & Cablecast Facilities, supra* note 42, at 531.

58. S.Rep. No. 96, 92d Cong., 1st Sess. _____ (1971), *reprinted in* 1972 U.S. Code Cong. & Ad.News 1773, 1775.

59. *In re Request by Reagan for President Comm. for Declaratory Ruling,* 80 F.C.C.2d 225, 227 (1980); *Campaign '76 Media Communications, Inc. v. Stations WGN & WGN-TV,* 58 F.C.C.2d 1142, 1144 (1976). *See Hernstadt v. FCC,* 677 F.2d 893, 897, 901 (D.C.Cir.1980)(purpose of statute is to lower amount spent on media advertising by giving candidates additional discount during pre-election period *while continuing to make comparable rates available during other periods*).

before a general or special election."[60] Indeed the House-Senate Conference Committee rejected a proposal that would have required broadcasters to offer candidates a year-round rate equal to the "*actual* charges ... for *any* comparable use of [the] station for other purposes."[61] The FCC has applied this policy and expressed extreme reluctance to broaden the meaning of "primary election" because of the consequent burden on broadcasters.[62]

In short, although Congress intended to allow access to the media at low rates, it carefully circumscribed the time during which those rates are available. The FCC has likewise moved with caution in applying the statute to the diverse sorts of political gatherings that take place in our 50 states. Furthermore, Congress and the FCC have limited the scope of the provisions to require broadcasters to charge the lowest unit rate to candidates and their campaign committees only.[63]

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60. S.Rep. No. 96, *supra* note 58, at _____, *reprinted in* 1972 U.S.Code Cong. & Ad.News 1773, 1781 (emphasis added); *see also* S.Rep. No. 229, 92d Cong., 1st Sess _____, (1971), *reprinted in* 1972 U.S.Code Cong. & Ad.News 1821, 1855 (views of Sens. Prouty, Cooper & Scott) (encouragement of shorter campaigns).

61. S.Conf.Rep. No. 580, 92d Cong., 1st Sess. _____(1971), *reprinted in* 1972 U.S. Code Cong. & Ad.News 1866, 1867 (emphasis in original).

62. *See In re Request by Reagan for President Comm. for Declaratory Ruling*, 80 F.C.C.2d 225 (1980). In that case the Commission overturned precedent holding that "caucuses" were not "primary elections"; candidates running in such caucuses were not, before this decision, entitled to receive a station's lowest unit charge during the 45-day window before the caucus. The FCC concluded that the Iowa caucuses, for which candidate Reagan sought to advertise at the lowest unit rate, were in effect "primaries." The Commission, however, made its ruling prospective in effect to avoid "considerable disruption to all concerned...." *Id.* at 228.

63. Section 315 does not apply to political broadcasts by "groups, organizations or persons other than candidates. [It] applies only to broadcasts by candidates for public office." *Use of Broadcast & Cablecast Facilities, supra* note 42, at 529.

The Texas statute sweeps far more broadly. Article 14.09(B) provides that for all political advertising—both candidate and issue advertising—a broadcaster can never charge more than "the lowest unit charge of the station for the same class, condition and amount of time for the same period." It permits access by candidates and their committees, but also allows noncandidates and unaffiliated committees to take advantage of the extremely low advertising rate. It extends the low rate from a period of days to the entire year. This extension of the statute's coverage to noncandidates and of the lowest unit charge to a year-round rule stands as an obstacle to the achievement of Congress' purpose in enacting the rate regulation statute.

Thus the Texas statute conflicts directly with the federal statute in important ways. It lengthens, rather than shortens, the "campaign season." It encourages greater, rather than lesser, campaign spending by encouraging candidates—and others—to advertise year-round. It imposes a considerably heavier burden on broadcasters to make low-cost time available to political advertisers than does the federal statute.[64] Finally, it may have the effect of limiting rather than increasing candidate access to the media by discouraging stations

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64. One of the reasons Congress settled on the lowest unit rate was to avoid the possibly devastating economic impact on small stations of a fixed discount for political advertising. *See* S.Rep. No. 96, *supra* note 58, at _____, *reprinted in* 1972 U.S.Code Cong. & Ad.News 1773, 1780 (lowest unit charge "makes use of each broadcaster's own commercial practices rather than imposing on him an arbitrary discount rate applicable to all stations regardless of their differences"); *Hearings on S.1, S.382, and S.956 Before the Subcomm. on Communications of the Senate Comm. on Commerce* 412 (1971) (remarks of Sen. Pastore). Texas' statute certainly conflicts with this purpose because it imposes a year-round discount instead of the limited discount Congress enacted.

from making advertising time available to nonfederal candidates at all.[65]

[31] KVUE also asserts that the sponsorship identification requirement violates the first amendment because it requires that certain statements be made with political speech, thus stripping the broadcaster of some measure of absolute editorial control. KVUE characterizes the sponsorship identification requirements as exacting a promise that certain words will be said as the price of political broadcasting and, therefore, as penalizing speech based on its political content.

The Supreme Court has recognized that preservation of the integrity of the electoral process is a compelling state interest.[66] As the Court stated in *Storer v. Brown*,

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65. Section 315 does not require broadcasters to give nonfederal candidates access to their stations. The courts and the FCC have consistently held that broadcasters may deny such access provided that their coverage of nonfederal elections satisfies their "public interest" obligation. *See CBS, Inc., v. FCC*, 453 U.S. 367, 379 & n. 6, 101 S.Ct. 2813, 2821 & n. 6, 69 L.Ed.2d 706, 718 & n. 6 (1981); *Hernstadt*, 677 F.2d at 903 & n. 26; *Felix v. Westinghouse Radio Station, Inc.*, 186 F.2d 1, 5 (3d Cir.1950), *cert. denied*, 341 U.S. 909, 71 S.Ct. 622, 95 L.Ed. 1347 (1951); *Law of Political Broadcasting, supra* note 42, at 2223, 2290. If a station permits nonfederal candidate access, however, it immediately becomes subject to the statute's "equal opportunity" provision, requiring it to make time available to all candidates for the office. The Texas statute, by requiring broadcasters to furnish such "equal time" on a lowest unit charge basis yearround, might cause stations simply to refuse to broadcast any political advertising. This result would directly thwart Congress' intent in passing § 315(b)(1) to give candidates greater opportunities to gain access to the broadcast media.

66. *American Party v. White*, 415 U.S. 767, 782 n. 14, 94 S.Ct. 1296, 1307 n. 14, 39 L.Ed.2d 744, 761 n. 14 (1974); *see Anderson v. Celebrezze*, _____U.S._____, _____ & n. 9, 103 S.Ct. 1564, 1570 & n. 9, 75 L.Ed.2d 547, 557 & n. 9 (1983).

415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714, 723 (1974), "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." Texas' sponsorship requirements are "generally-applicable and evenhanded regulations that protect the integrity and reliability of the electoral process itself."[67] They do not regulate the content of the political message. Even assuming *arguendo* that the Texas sponsorship identification requirement infringes on KVUE's first amendment rights, the infringement is of an extremely limited nature because it merely adds the words "paid political announcement" and the sponsor's address to the federal requirement, the constitutionality of which KVUE does not challenge. By contrast the state interest is compelling. Accordingly, under the balancing test of *Anderson*, _____U.S. at _____, 103 S.Ct. at 1570, 75 L.Ed.2d at 557, the Texas requirement does not violate the first amendment.

For these reasons, the judgment of the district court is REVERSED and the case is REMANDED for proceedings consistent with this opinion.

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67. *Anderson*, _____U.S. at_____ n. 9, 103 S.Ct. at 1570 n. 9, 75 L.Ed.2d at 557 n. 9.

Appendix B

United States Court of Appeals

For The Fifth Circuit

No. 82-1192

D.C. Docket No. A-81-CA-446

KVUE, INC., *Plaintiff-Appellant,*

and

AUSTIN BROADCASTING CORP. and Central Texas Broadcasting Co., Inc., *Intervenors-Appellants,*

v.

Margaret MOORE, In Her Official Capacity as County Attorney for Travis County, Texas, *Defendant-Appellee,*

and

The State of Texas, *Intervenor-Appellee.*

Appeal from the United States District Court for the Western District of Texas

Before RUBIN, GARZA and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings consistent with the opinion of this Court;

IT IS FURTHER ORDERED that the appellees pay to the appellants, the costs on appeal to be taxed by the Clerk of this Court.

July 18, 1983

ISSUED AS MANDATE: Aug. 9, 1983

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

KVUE-TV, INC.	)	
	)	
Plaintiff	)	
	)	
and	)	
	)	
AUSTIN BROAD-CASTING CORP., CENTRAL TEXAS BROADCASTING CO., INC.	)	
	)	
Intervenors	)	
	)	
V.	)	**CIVIL ACTION A-81-CA-446**
MARGARET MOORE, IN HER OFFICIAL CAPACITY AS COUNTY ATTORNEY FOR TRAVIS COUNTY, TEXAS	)	
	)	
Defendant	)	
and	)	
	)	
STATE OF TEXAS	)	
Intervenor	)	

MEMORANDUM OPINION AND ORDER

KVUE-TV, INC. (KVUE) filed suit against MARGARET MOORE, in her official capacity as county attorney for Travis County, Texas,[1] wherein it attacked the constitutionality of provisions contained in the Texas Election Code. KVUE principally contends that TEX. ELEC. CODE ANN. art. 14.09(B) (Vernon Supp. 1982),[2] hereinafter referred to as Article 14.09(B), which prescribes standards for determining the rates that advertising media may charge for political advertising, violates rights guaranteed it under the First and Fourteenth Amendments to the United States Constitution

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1. The County Attorney of Travis County, Texas, is empowered to prosecute misdemeanor offenses. Transcript of Preliminary Injunction Hearing, pp. 11-12; TEX. CONST. art. V, sec. 21; TEX. REV. CIV. STAT. ANN. art. 329, et. seq.

2. TEX. ELEC. CODE ANN. art. 14.09(B) (Vernon Supp. 1982) provides that:

> (B) Any advertising medium or any officer or agent thereof who willfully demands or receives for any political advertising any money or other thing of value in excess of the sum due for such service, or any person who pays or offers to pay for such service any money or other thing of value in excess of the sum due, or any person who pays or offers to pay any money or other thing of value for the publication or broadcasting of political advertising except as advertising or production matter, shall be fined not more than $100. No advertising medium may charge a rate for political advertising in excess of the following:
>
> > (1) For advertising broadcast over a radio or television station, including a community antenna or cable television system, the rate charged shall not exceed the lowest unit charge of the station for the same class, condition and amount of time for the same period;

and contravenes Article VI of the Constitution.[3] Plaintiff's Original Complaint also encompasses an Article VI challenge of TEX. ELEC. CODE ANN. art. 14.09(A) (Vernon Supp. 1982),[4] hereinafter referred to as Article 14.09(A). Specifically, Plaintiff argues that state regulation of the subject matter covered by this statute (i.e. requirements concerning the inclusion of certain sponsorship identification in political ads) has been pre-empted by prior congressional action. The sanction specified for violating Article 14.09(B) is a fine of not more than one hundred dollars; whereas the failure to adhere to the sponsorship identification mandates of Article 14.09(A) entails punishment as a Class A misdemeanor.[5]

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3. Article VI, paragraph 2, of the United States Constitution states in pertinent part that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;... shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

4. The challenged portion of TEX. ELEC. CODE ANN. art. 14.09(A) (Vernon Supp. 1982) provides that:

> (A) It is unlawful for any person knowingly to enter into a contract or transaction to print, publish or broadcast, any political advertising which does not disclose thereon the name and address either of the agent who personally entered into the contract or transaction with the printer, publisher, or broadcaster, or the person represented by such agent. A violation of this provision shall constitute a class A misdemeanor...

5. One adjudged guilty of a Class A misdemeanor shall be punished by 1) a fine not to exceed $2,000; 2) confinement in jail not to exceed one year; or 3) both fine and imprisonment. TEX. PENAL CODE ANN. sec. 12.21 (Vernon 1974).

Article 14.09(D) of the Texas Election Code expressly provides that the legislative intent underlying the enactment of the challenged statutes is the imposition of civil and criminal sanctions for violations.

Plaintiff filed its Original Complaint on October 29, 1981, and the relief specifically requested therein included the Court's issuance of a permanent injunction and declaratory judgment. Plaintiff contemporaneously filed a Motion for Temporary Restraining Order and Preliminary Injunction. Plaintiff's Motion for Temporary Restraining Order was granted on the date of its filing after a brief hearing thereon with both parties present. Shortly thereafter, the STATE OF TEXAS was granted permission to intervene in behalf of Defendant MOORE, and this Defendant-Intervenor promptly filed a Motion to Dismiss accompanied by a supporting brief.

The preliminary injunction additionally sought by KVUE was considered by the Court at an evidentiary hearing on November 17, 1981. Following the Court's careful review of the testimony, exhibits and arguments of counsel, Plaintiff's Motion for Preliminary Injunction was denied, and this action was set for trial. Less than a week before trial, an Order was entered allowing AUSTIN BROADCASTING CORP. and CENTRAL TEXAS BROADCASTING CO., INC. to intervene herein in behalf of Plaintiff.

This cause was tried to the Court on January 11, 1982. Closing arguments of counsel addressed the evidence presented at trial and the STATE'S pending Motion to Dismiss.

TEX. ELEC. CODE ANN. art. 14.09(B)(Vernon Supp. 1982)

JUSTICIABILITY

The threshold issue to be resolved by this Court is whether the instant action rises to the level of a "case or controversy" as required by Article III of the United States Constitution. Before this Court may consider the significant constitutional challenges lodged by Plaintiff, and Intervenors in its behalf, this action must be justiciable; it must transcend the point of merely presenting an abstract question. Discerning the difference between a "case or controversy" and an abstract question may not be achieved by a precise test. *Babbitt, et.al. v. United Farm Workers National Union, et.al.*, 442 U.S. 289, 297 (1979). This Court's fundamental inquiry is ascertaining whether there is a substantial dispute between parties having adverse legal interests of sufficient immediacy and reality, which is definite and concrete, not hypothetical or abstract. *Railway Mail Assn. v. Corsi*, 376 U.S. 88, 93 (1945).

Authority - compelling authority - supporting the STATE'S Motion to Dismiss for Want of Jurisdiction is rooted in *Younger v. Harris, et.al.*, 401 U.S. 37 (1971) and *Boyle, et.al. v. Landry, et.al.*, 401 U.S. 77 (1971). In *Younger*, the position of intervenors Dan, Hirsch and Broslawsky is equatable to that of the complaining parties in the instant lawsuit. The *Younger* intervenors argued that the Plaintiff's prosecution under a California sydicalism statute "inhibited" or "made uncertain" their exercise of First and Fourteenth Amendment rights. These intervening parties, however, did not allege nor did the evidence reveal that they were threatened with prosecution (as was Younger) for violation of the challenged provision. Justice Black, writing the majority opinion, was unwilling to find such speculative, tenuous injuries avowedly suffered by the intervenors as sufficient to present an Article III case or controversy, which would authorize their attack of the California statute. In dismissing the intervenors from

Younger's lawsuit as improper parties, the Court blanketly stated that, "persons having no fears of state prosecution except those that are imaginary or speculative are not to be accepted as appropriate..." *Younger v. Harris, supra.* p. 42.

The STATE'S Motion to Dismiss is further bolstered by *Boyle v. Landry, supra.* where the Plaintiffs brought suit seeking a declaratory judgment and injunction against the enforcement of various Illinois statutes and Chicago ordinances contending they were constitutionally invalid. The Supreme Court noted that the Plaintiffs, although alleging that Defendants had threatened to enforce the subject statutes against them, had not shown any irreparable injury from threats or actual prosecutions. Moreover, Justice Black observed that none of the persons who brought suit in federal court had ever been prosecuted, charged, or even arrested under the challenged provisions. Black concluded that:

> There is nothing contained in the allegations of the complaint from which one could infer that any one or more of the citizens is in any jeopardy of suffering irreparable injury if the State is left free to prosecute under the intimidation statute in the normal manner. [The] normal course of state criminal prosecutions cannot be disrupted or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future. *Boyle v. Landry, supra.*, p. 81.

Significantly, the pleadings and proceedings herein have failed to disclose any evidence that KVUE-TV, INC., AUSTIN BROADCASTING CORP. or CENTRAL TEXAS BROADCASTING CO., INC., has *ever* been threatened with prosecution for violating the subject provisions of the Texas Election Code. Moreover,

managerial representatives of these corporations acknowledge under oath that their employers have been charging rates which the *broadcasters believe* to be proscribed by Article 14.09(B). In particular, KVUE admits billing advertising time for political issues since October, 1981, at a rate which purportedly disregards Article 14.09(B) specifications. The media parties who complain in this action have flaunted their rates for political commercials and almost taunted political advertisers as well as the County Attorney's Office ostensibly inviting prosecution—but to no avail. Despite the broadcasters apparently overt effors to become the subjects of a state criminal action the County Attorney for Travis County has declined to undertake prosecution of the self professed violators citing under oath as reasons: 1) the ambiguous language of Article 14.09(B) (now the requested subject of a Texas Attorney General Opinion)[6] which conceivably may authorize the political advertising rates presently charged by the complaining parties, 2) the related difficulty of maintaining a prosecution under this statute, and 3) the absence of any filed formal complaints seeking redress for the broadcasters alleged statutory violations.

The credible threatened injury which KVUE, et.al. must substantiate as presenting an Article III case or controversy is not merely imaginary or speculative...it is at this point phantom. For in excess of four months KVUE has charged political advertising rates which *it* perceives as contrary to the specifications of Article 14.09(B) without consequence. The dismissed intervenors in *Younger v. Harris, supra.*, could at least

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6. During the trial of this cause, evidence was submitted which disclosed that on December 22, 1981, State Representative Gerald Hill, Chairman of the Committee on Elections, requested of the Texas Attorney General, a formal opinion construing ambiguous aspects of TEX. ELEC. CODE ANN. art. 14.09(B) (Vernon Supp. 1982). Defendant's Exhibit 1.

claim that they felt "inhibited" by Harris' prosecution; KVUE, et.al. cannot truthfully contend even that. Moreover, no judicial, legislative, administrative or law enforcement entity has formally stated that KVUE's interpretation of this ambiguous statue is accurate. The County Attorney's Office for Travis County to date has not initiated any prosecution efforts against KVUE or any of the intervenors; nor does KVUE or its fellow intervenors have reason at this point to fear a future prosecution.

The response of the Plaintiff and aligned Intervenors to the STATE's Motion to Dismiss largely hinges on a single sentence from *Babbitt v. United Farm Workers National Union, supra.*, where the United States Supreme Court found that certain of the constitutional challenges to Arizona's farm labor statutes were justiciable since the State "[had] not disavowed any intention of invoking the criminal penalty provision against unions that commit unfair labor practices." KVUE, et.al. argue that there has been no such disavowal by the County Attorney in the instant case.

Although the County Attorney testified under oath that if presented with certain conduct she would contemplate criminal charges under Article 14.09(B), the overwhelming weight of her testimony at the hearing on Plaintiff's Motion for Preliminary Injunction indicates that she has not made any threats of prosecution against KVUE or any other advertising medium and she does not anticipate any criminal prosecution at this time. Pertinent portions of Defendant MOORE's testimony include the following:

Q. Now, has any conduct come to your attention on the part of my client that involves possible violation of Article 1409?

A. Well, you have made the statement that you are in violation of a law, or your client is. I have not seen any conduct. I have had a couple of inquiries made as to what would happen if someone wanted to come take a complaint, and I think I have mentioned to those people what I would need to see, but I have not seen anything.

Q. And you have had inquiries from other people, I take it, besides myself?

A. Well, from Mr. Helfert and Mr. Spelzer I'm sure you know about that, but no one has presented me with any actual conduct. It's been a rather conclusory situation, if you will.

Q. Do you know what conduct the statute in question prohibits specifically?

A. No, I do not.

Q. Have you to date made any threat whatsoever of prosecution of KVUE-TV?

A. No.

Q. The Plaintiff in this case?

A. I don't think I have made any threats at all.

THE COURT: Have you threatened any entity that broadcasts political advertising with prosecution for violation of this Article 1409-B?

THE WITNESS: No, sir. We have not been presented with a complaint.

THE COURT: Do you anticipate prosecuting the Plaintiff in this situation for violations of Article 1409-B?

THE WITNESS: No, sir, not at this time.

Q. Now, I take it the answer that you haven't made a threat to prosecute the Plaintiff at this time means that you simply are keeping your options open depending on developments that may occur in connection with this particular problem; is that right?

A. Keeping my options open—I think the options are open. I never—Well, I have made it a practice since I took office not to give what I call advisory opinions. In other words, I have a number of people call me on different matters who say, "Would you prosecute us if we did this." and I have declined to answer those kinds of questions because I think it's improper. I have to be presented with a fact situation before I'm willing to say whether I will or will not prosecute under that set of facts. This statute is there for whatever reason. It has some problems in it, Mr. George, and I'll be honest with you, *I would be hard pressed to prosecute anyone under that statute* without some sort of clarification as to a number of different items. In other words, there are a number of problems in there for a prosecutor if you are really going to talk about putting a case together, *so it's safer for me to say I'm not going to prosecute anyone than it is to say I am given the situation at this time.*

(Transcript of Preliminary Injunction Hearing)

Although Defendant MOORE did not explicitly disavow any intention of ever enforcing the criminal

penalties of Article 14.09(B) against Plaintiff, her testimony, cumulatively considered, would clearly allay any reasonable fear of prosecution under attacked provision. It is the view of the Court that the testimony of the County Attorney for Travis County was tantamount to an implicit disavowal of invoking criminal sanctions under Article 14.09(B). Surely, in light of the testimony of Defendant MOORE, particularly when coupled with the complainants' self-claimed non-compliance with Article 14.09(B), which has continued unthreatened, the present fears of prosecution alleged by Plaintiff and Intervenors are diminished to the level of speculation.

In addition, *Doe v. Bolton*, 410 U.S. 179 (1972), relied on by KVUE, et.al. is inapposite since the statute challenged applied particularly and *unambiguously* to the activities in which the Plaintiffs engaged or sought to engage. (see discussion of abstention issue, *infra.*) In *Bolton*, physicians were prosecuted under the Georgia abortion statute which was the predecessor to the one attacked. *Bolton, supra.* pp. 188-189. Furthermore, complaintants' reliance on *Lake Carriers' Assn. v. MacMullan*, 406 U.S. 498 (1972), is also inappropriate. In *Lake Carriers' Assn.*, Michigan authorities coerced compliance with the challenged statute through threats of future enforcement. *Lake Carriers' Assn., supra.* pp. 506-508. The facts which supported a finding of an Article III case or controversy in these two Supreme Court decisions are absent here.

Complainants also rely on *Let's Help Florida v. McCray*, 621 F.2d 195 (5th Cir. 1980), wherein the Fifth Circuit affirmed the District Court's finding that First Amendment challenges to a Florida statute imposing a ceiling on contributions to political committees were sufficient to confer federal jurisdiction under *Babbitt, supra.* The *Let's Help Florida* opinion carefully distinguished the facts addressed by the Second Circuit in *St. Martin's Press, Inc. v. Carey*, 605 F.2d 41 (2d Cir. 1979). In *St.*

Martin's Press, the Second Circuit reversed the District Court's determination that an Article III case or controversy was presented when a publisher and book store owners sought to enjoin the enforcement of an allegedly unconstitutional New York child pornography statute. The Second Circuit, refusing to find that the requirements of Article III had been satisfied, noted that the district attorneys enjoined by the District Court had done "...nothing, absolutely nothing. They have not prosecuted the plaintiffs. They have not threatened to prosecute the plaintiffs. They have shown no interest or concern over plaintiff's book. Clearly, plaintiffs had no reason to believe that appellants intended to prosecute them under section 263.15 for disseminating their 'educational' work." *St. Martin's Press, supra.* p. 44. The Second Circuit's review of the trial court proceedings revealed that the Plaintiffs *alone* believed that the subject statute unquestionably applied to their book, whereas the District Attorneys took the position that the New York statute may not govern the publication. The appellate court placed particular emphasis on the arguments of Defendants' counsel which were presented to the District Court:

> I'm frankly a little at a loss to understand why it is that the District Attorney of New York County is here before your Honor. I know procedurally we were served and there is a lawsuit and we are here but it's a suit to enjoin us from doing something which we have never done in the past, which we have not threatened to do and which we don't contemplate doing and more than that I can't say.
>
> *St. Martin's Press. supra* p. 45.

These arguments of Defendant's counsel in *St. Martin's Press* are strikingly similar to the testimony of Defendant MOORE. Clearly, the material facts of the instant

case more closely parallel *St. Martin's Press* than *Let's Help Florida*. Consequently, the Fifth Circuit decision—which painstakingly differentiated the facts addressed in the Second Circuit case—would not control the Article III merits of KVUE's statutory challenge.

Moreover, the degree of concrete adversity presented herein does not measure up to the more clearcut, antagonistic interests of the parties in *Fernandez v. Limmer*, 663 F.2d 619 (5th Cir. 1981), where the Fifth Circuit deemed that the Plaintiff, a Krishna devotee, through threatened disobedience, (and conceivably also in view of prior arrests of Krishna followers under a precursor ordinance) fulfilled Article III requirements to challenge an ordinance regulating literature distribution and fund solicitation in the Dallas-Fort Worth airport complex. Again, the advertising media waging the constitutional challenges herein not only have threatened but rather have routinely performed their "disobedience" (i.e. charging political advertisers rates which these broadcasters assume under their construction of Article 14.09(B) are prohibited) without result. It is the opinion of this Court that the present positions of the parties in this action are not sufficiently adverse to provide a case or controversy within this Court's jurisdiction.

The recent Supreme Court decision of *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 50 U.S.L.W. No. 26, p. 4103, January 12, 1982, offers further guidance to this Court in addressing Article III requirements.

> The requirements of Art. III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process, the judicial power of the

> United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts. The power to declare the rights of individuals and to measure the authority of governments, this Court said 90 years ago, "is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy." *Chicago & Grand Truck R. Co. v. Wellman*, 143 U.S. 339, 345 (1892)... [Legal] questions presented to the Court [are to be] resolved, not in the rarefied atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.

Valley Forge Christian College, supra. p. 4105

ABSTENTION

Furthermore, even if this Court were to find that Plaintiff and Intervenors had satisfied the "case or controversy" requirements of Article III and this action were thereby ripe for present review, *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941) and its successors would counsel abstention. Specifically, TEX. ELEC. CODE ANN. art. 14.09(B) (Vernon Supp. 1982) prohibits political advertising rates which "exceed the lowest unit charge...for the same class, condition and amount of time for the same period." The STATE alleges that this statute is subject to varying constructions. Despite complainants' construction of Article 14.09(B) as requiring advertising media to charge political advertisers "bulk rates," this statute may arguably only proscribe discrimination against political advertisers to the extent that they could not be charged higher rates than other non-political advertisers who purchase commercials of the same class, amount of time, time period and condition. Consequently, this statute,

which has not yet been the subject of state court scrutiny,[7] reasonably could be interpreted by a Texas tribunal in a manner which might moot the federal constitutional issues or present them in a different posture. Therefore, under *Palmer v. Jackson*, 617 F.2d 424, 428 (5th Cir. 1980), this Court's abstention is warranted.

In *Moore v. Sims*, 442 U.S. 415 (1979), the Supreme Court illustrates considerations which instruct federal court abstention from resolving broad-based challenges to state statutes. These considerations compel abstention when 1) a federal court's constitutional adjudication of an unsettled issue of state law is predicted on an interpretation which could be discredited by a subsequent state court construction—"thus essentially rendering the federal-court decision advisory and the litigation underlying it meaningless," 2) an Article III case or controversy is absent, and 3) the dictates of federalism would be threatened by improperly interfering with the long standing policy that state laws should be construed by state courts. *Moore v. Sims*, 442 U.S. 428, 429. See *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1033-1036 (5th Cir. 1981). Justice Rehnquist continued:

> State courts are the principal expositors of state law. Almost every constitutional challenge ... offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests. When federal courts disrupt that process of mediation while interjecting themselves in such disputes, they prevent the informed evolution of state policy by state tribunals. The

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7. As indicated in footnote 6, the attacked provision is now the subject of a request for a Texas Attorney General Opinion.

> price exacted in terms of comity would only be outweighed if state courts were not competent to adjudicate fede4ral constitutional claims—a postulate we have repeatedly and emphatically rejected.

Moore v. Sims, 442 U.S. 429, 430 (citations omitted)

Plaintiff and allied Intervenors implore the Court to avoid abstention. In their Trial Brief, complainants contend that through 47 U.S.C. § 315(b)[8] Congress has evidenced an intent to fully occupy the field of political advertising by broadcasters; therefore states are not at liberty to enact their own statutes which would regulate this area. According to KVUE, et.al. such congressional preemption would negate any rationale for this Court's deferring interpretation of Article 14.09(B) to the State judiciary under abstention principles. Underlying complainant's preemption assertions is the alleged congressional intent to monopolize regulation of political advertising by broadcasters. This critical foundation of complainants' anti-abstention arguments crumbles when subjected to more careful study.

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8. 47 U.S.C. sec. 315(b) specifies that:

> (b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed-
>
> > (1) During the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and
> >
> > (2) At any other time, the charges made for comparable use of such station by other users thereof.

When the Federal Election Campaign Act of 1971 (which included 47 U.S.C. § 315(b)) was enacted, it contained the following provision:

> Sec. 403(a) Nothing in this Act shall be deemed to invalidate or make inapplicable any provision of any State law, except where compliance with such provision of law would result in a violation of a provision of this Act.

86 U.S. Statutes at Large 20 (1971). In 1974, this provision, codified as 2 U.S.C. § 453, was amended as follows:

> The provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to *Federal office.* (emphasis added)

88 U.S. Statutes at Large 1289 (1974). As a consequence, Congress has expressly limited the boundaries of preemption exclusively to elections for federal office, and accordingly, Article 14.09(B) would not apply to such elections. TEX. ATTY. GEN. OP. NOS. H-588 (1975) and H-433 (1974). Congress, however, clearly did not seek to foreclose legislatures from adopting laws which would regulate state elections. The regulation of state elections is wholly within the authority of the individual states. *Oregon v. Mitchell,* 400 U.S. 112 (1970), *United States v. Tonry,* 605 F.2d 144 (1979). It is apparent on the face of 2 U.S.C. § 453 and from other persuasive authority that complainants' 14.09(B) preemption argument must fall.

TEX. ELEC. CODE ANN art. 14.09(A) (Vernon Supp. 1982)

Although a review of the justiciability of complainants' Article 14.09(A) challenge differs from

scrutiny of the complainants' Article 14.09(B) attack inasmuch as no evidence was introduced that the broadcasters have deliberately embarked on a course of contravening their construction of the seemingly unambiguous requirements of Article 14.09(A), the thrust of the Court's preceding "case or controversy" analysis of the Article 14.09(B) attack presented herein would control. Simply stated, the Court is of the opinion that the Plaintiff and aligned Intervenors have failed to present a substantial controversy where the parties have adequately adverse legal interests of sufficient immediacy and reality to warrant the issuance of declaratory judgment.

Moreover, even *assuming* complaints had overcome their Article III barrier, the Court, if addressing the merits of the broadcasters' attack of Article 14.09(A), would uphold this statute's constitutionality. Congress, in the 1960 Communications Act amendments, enacted requirements for the inclusion of sponsorship indentification in *all* broadcast advertising. 47 U.S.C. § 317.[9] The scope of this federal statute encompassed much

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9. 47 U.S.C. sec. 317 provides that:

> (a)(1) All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person: Provided, That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond any identification which is reasonably related to the use of such service or property on the broadcast.

(footnote continued on following page)

more than political or candidate advertising. Subsequently, in amending the Federal Election Campaign Act of 1971, Congress adopted more stringent identification burdens for federal campaign advertising. 2 U.S.C. § 441(d).[10] Although 47 U.S.C. § 317 and the FCC regulations thereunder do not address the issue of

---

(footnote continued from previous page)

(2) Nothing in this section shall preclude the Commission from requiring that an appropriate announcement shall be made at the time of the broadcast in the case of any political program or any program involving the discussion of any controversial issue for which any films, records, transcriptions, talent, scripts, or other material or service of any kind have been furnished, without charge or at a nominal charge, directly or indirectly, as an inducement to the broadcast of such program.

10. 2 U.S.C. 441d provides in pertinent that:

(a) Whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station,...such communiction —

(1) if paid for and authorized by a candidate, and authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee, or

(2) if paid for by other persons but authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication is paid for by such other persons and authorized by such authorized political committee.

(3) if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.

(footnote continued on following page)

preemption of State laws, the Federal Election Campaign Act, which includes 2 U.S.C. sec. 441(d) clearly does. As previously noted, the Federal Election Campaign Act of 1971, only preempts state law with regard to *federal* office elections. 2 U.S.C. § 453.

Congress, by adopting the provisions in the Federal Election Campaign Act which supplement the identification requirements contained in the Communications Act, has determined that the specifications of 47 U.S.C. § 317 are insufficient for *federal* election advertising. This congressional determination, coupled with Congress' express authorization conferred upon the states to enact election campaign laws for their own elections (2 U.S.C. § 453), results in the inescapable conclusion that Congress has tacitly permitted the states also to supplement the sponsorship identification requirments of 47 U.S.C. § 317 for state elections. Furthermore, the requirements of Article 14.09(A) which slightly exceed the identification mandates of 47 U.S.C. § 317 do not conflict with the federal regulation of this field. Certainly, a state is empowered to regulate its state election process. *United States v. Tonry, supra.* Consequently, the state of Texas has not been preempted from enacting Article 14.09(A) with respect to political advertising for non-federal elections.

It is therefore ORDERED that for the foregoing reasons this cause shall be dismissed.

(footnote continued from previous page)

> (b) No person who sells space in a newspaper or magazine to a candidate or to the agent of a candidate, for use in connection with such candidate's campaign, may charge any amount for such space which exceeds the amount charged for comparable use of such space for other purposes.

It is further ORDERED that pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, Defendant MARGARET MOORE, in her offical capacity as County Attorney for Travis County, Texas, and Defendant-Intervenor STATE OF TEXAS shall recover from Plaintiff KVUE-TV, INC., Intervenor AUSTIN BROADCASTING CORP., and Intervenor CENTRAL TEXAS BROADCASTING CO., INC. their costs of court.

It is further ORDERED that Plaintiff KVUE-TV, INC., Intervenor AUSTIN BROADCASTING CORP., and Intervenor CENTRAL TEXAS BROADCASTING CO., INC. shall not recover their attorney's fees herein from Defendant MARGARET MOORE, in her official capacity as County Attorney for Travis County, Texas, or from Defendant-Intervenor STATE OF TEXAS.

SIGNED and ENTERED this 18th day of March, 1982.

/s/ James R. Nowlin

JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

APPENDIX D

Judgment on Decision by the Court

UNITED STATES DISTRICT COURT

For The

WESTERN DISTRICT OF TEXAS - AUSTIN DIVISION

Civil Action File No. A-81-CA-446

KVUE-TV, INC., et al.	)	
	)	
vs.	)	JUDGMENT
	)	
MARGARET MOORE, et al.	)	

This action came on for trial before the Court, Honorable James R. Nowlin, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, Defendant Margaret Moore, in her official capacity as County Attorney for Travis County, Texas, and Defendant-Intervenor State of Texas shall recover from Plaintiff KVUE-TV, INC., Intervenor Austin Broadcasting Corp., and Intervenor Central Texas Broadcasting Co., Inc. their costs of court.

It is further Ordered that Plaintiff KVUE-TV, INC., Intervenor Austin Broadcasting Corp., and Intervenor Central Texas Broadcasting Co., Inc. shall not recover their attorneys' fees herein from Defendant Margaret

Moore, in her official capacity as County Attorney for Travis County, Texas or from Defendant-Intervenor State of Texas.

Dates at Austin, Texas, this 19th day of March, 1982.

CHARLES W. VAGNER

Clerk of Court

/s/ Sally Looke
Sally Looke, Deputy

APPENDIX E

Filed September 23, 1983

No. 82-1192

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

* * *

KVUE-TV, INC., ET AL.
V.
MARGARET MOORE, ET AL.

* * *

NOTICE OF APPEAL

* * *

The State of Texas, intervenor-appellee in this case, hereby gives notice that it will appeal from the judgment of the United States Court of Appeals for the Fifth Circuit entered July 18, 1983. The State of Texas will appeal to the United States Supreme Court pursuant to 28 U.S.C. section 1254(2).

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant

/s/ Margaret S. McGloin

MARGARET S. McGLOIN
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-4481

AFFIDAVIT OF SERVICE

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

BEFORE ME, the undersigned Notary Public, on this day personally appeared Margaret S. McGloin, who, being by me duly sworn on her oath deposed and said that she is an assistant attorney general of Texas and counsel for the State of Texas in this cause, and that a true and correct copy of the foregoing instrument has been served on all parties required to be served by depositing same in the United States mail, certified, return receipt requested, addressed to:

David H. Donaldson, Jr.
GRAVES, DOUGHERTY, HEARON, & MOODY
2300 Austin National Bank Tower
Austin, Texas 78701
Attorneys for KVUE-TV, Inc.,
Austin Broadcasting Corp., and
Central Broadcasting Corp.

James W. Collins
Assistant County Attorney
P.O. Box 1748
Austin, Texas 78767
Attorney for Margaret Moore,
In her official capacity as
County Attorney for Travis
County, Texas

/s/ Margaret S. McGloin

MARGARET S. McGLOIN
Assistant Attorney General

SUBSCRIBED AND SWORN TO BEFORE ME on the 22nd day of September, 1983, to certify which witness my hand and official seal.

/s/ Pat Angeli

NOTARY PUBLIC in and for
The State of Texas

APPENDIX F

TEXAS ELECTION CODE ANNOTATED

Article 14.01 Definitions
As used in this chapter—

* * *

(R) "Political advertising" is defined as anything in favor of or in opposition to any candidate for public office or office of a political party, or in favor of or in opposition to any political party, or in favor of or in opposition to the success of any public officer, or in favor of or in opposition to any measure submitted to a vote of the people, which is communicated in any of the following forms:

(1) anything published in a newspaper, magazine, or journal or broadcast over a radio or television station in consideration of money or other thing of value; or

(2) any handbill, pamphlet, circular, flier, commercial billboard sign, bumper sticker, or similar printed material.

The term does not include non-political letterheads, ordinary printed invitations to and tickets for fund-raising events or other affairs, campaign pins, buttons, fingernail files, matchbooks, emblems, hats, pencils, and similar materials.

Art. 14.09 Political Advertising

(A) It is unlawful for any person knowingly to enter into a contract or transaction to print, publish or broad-

cast, any political advertising which does not disclose thereon that it is political advertising and which does not state thereon the name and address either of the agent who personally entered into the contract or transaction with the printer, publisher, or broadcaster, or the person represented by such agent. A violation of this provision shall constitute a Class A misdemeanor. However, in the event the political advertisement conveys the impression that it emanates from a source other than its true source for the purpose of injuring any candidate or influencing the vote in any election, the candidate, campaign treasurer, assistant campaign treasurer or any other person purchasing or contracting for the furnishing of such political advertisement in support of or in opposition to any candidate or measure, who knowingly violates this subsection shall be guilty of a felony of the third degree.

(B) Any advertising medium or any officer or agent thereof who willfully demands or receives for any political advertising any money or other thing of value in excess of the sum due for such service, or any person who pays or offers to pay for such service any money or other thing of value in excess of the sum due, or any person who pays or offers to pay any money or other thing of value for the publication or broadcasting of political advertising except as advertising or production matter, shall be fined not more than $100. No advertising medium may charge a rate for political advertising in excess of the following:

(1) For advertising broadcast over a radio or television station, including a community antenna or cable television system, the rate charged shall not exceed the lowest unit charge of the station for the same class, condition and amount of time for the same period;

(2) For advertising printed or published by any other medium, the rate charged shall not exceed the lowest

charge made for comparable use of such space for other purposes. The rate shall take into account the amount of space used, the number of times used, the frequency of use, and the kind of space used, as well as the type of advertising copy submitted by or on behalf of a candidate, or political committee. All discount privileges otherwise offered by a newspaper or magazine to advertisers shall be available upon equal terms to all candidates, or political committees.

(C) It is unlawful for an officer or employee of any political subdivision of this state to expend or authorize the expenditure of the funds of such political subdivision for the purpose of political advertising. The provisions of this subsection shall not apply to any advertising which describes the factual reasons for a measure and which does not advocate the passage or defeat of such measure.

(D) It is the legislative intent to impose both civil and criminal responsibility on persons, corporations, partnerships, labor unions, or labor organizations, or any unincorporated associations, firms, committees, clubs, or other organizations, or groups of persons, including any groups of persons associated with a political party or element thereof, for violations of this section.

UNITED STATES CODE

2 U.S.C. § 441d

§ 441d. Publication and distribution of statements and solicitations; charge for newspaper or magazine space

(a) Whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broad-

casting station, newspaper, magazine, outdoor advertising facility, direct mailing, or any other type of general public political advertising, such communication—

(1) if paid for and authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee, or

(2) if paid for by other persons but authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication is paid for by such other persons and authorized by such authorized political committee;

(3) if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.

(b) No person who sells space in a newspaper or magazine to a candidate or the agent of a candidate, for use in connection with such candidate's campaign, may charge any amount for such space which exceeds the amount charged for comparable use of such space for other purposes.

2 U.S.C. § 453

§ 453. State laws affected

The provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office.

§315. Candidates for public office

(a) Equal opportunities requirement; censorship prohibition; allowance of station use; news appearances exception; public interest; public issues discussion opportunities

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,
(2) bona fide news interview,
(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(b) Broadcast media rates

The charges made for the use if any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, or election to such office shall not exceed—

(1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and

(2) at any other time, the charges made for comparable use of such station by other users thereof.

(c) Definitions

For purposes of this section—

(1) the term "broadcasting station" includes a community antenna television system; and

(2) the terms "licensee" and "station licensee" when used with respect to a community antenna television system mean the operator of such system.

(d) Rules and regulations

The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

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Office - Supreme Court, U.S.
FILED
NOV 18 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-640

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

THE STATE OF TEXAS

Appellant,

VS.

KVUE-TV, INC., ET AL,

Appellees.

On Appeal from
The United States Court of Appeals
for the Fifth Circuit

MOTION OF APPELLEES KVUE-TV, INC., AUSTIN BROADCASTING CO., INC., AND CENTRAL TEXAS BROADCASTING CO., INC. TO DISMISS OR AFFIRM

ROGER JAMES GEORGE, JR.
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Counsel for Appellees

QUESTIONS PRESENTED

I. Whether the Tenth Amendment precludes federal regulation of political advertising.

II. Whether the Texas statute setting the rates that may be charged for political advertising conflict with federal law and, therefore, are pre-empted.

III. Whether the Texas statute requiring broadcasters to charge lower rates for political advertising than comparable commercial advertising has the effect of compelling broadcasters to subsidize political campaigns in violation of the broadcasters' rights under the First and Fourteenth Amendments.

PARTIES TO THE PROCEEDING

Appellant The State of Texas was Intervenor-Defendant in the District Court and Appellee in the Court of Appeals.

Appellee Margaret Moore, in her official capacity as County Attorney for Travis County, Texas, was Defendant in the District Court and Appellee in the Court of Appeals.

Appellee KVUE-TV, Inc. was Plaintiff in the District Court and Appellant in the Court of Appeals.

Appellees Austin Broadcasting Corp. and Central Texas Broadcasting Co., Inc. were Intervenor-Plaintiffs in the District Court and Appellants in the Court of Appeals.

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NO. 83-640

IN THE SUPREME
COURT OF THE UNITED STATES
October Term 1983

THE STATE OF TEXAS,

Appellant,

VS.

KVUE-TV, INC., ET AL,

Appellees.

On Appeal from
The United States Court of Appeals
for the Fifth Circuit

MOTION OF APPELLEES KVUE-TV, INC., AUSTIN BROADCASTING CO., INC., AND CENTRAL TEXAS BROADCASTING CO., INC. TO DISMISS OR AFFIRM

Appellees KVUE-TV, INC., AUSTIN BROADCASTING CO., INC. and CENTRAL TEXAS BROADCASTING CO., INC., pursuant to Rule 16 of the Rules of the Supreme

Court of the United States, respectfully move to dismiss the appeal or affirm the judgment of the United States Court of Appeals on the ground that the questions on which the decision of the cause depends were correctly decided and do not present a substantial federal question.

STATEMENT

This is an appeal from the judgment entered by the United States Court of Appeals for the Fifth Circuit holding that a Texas statute which regulates the rates charged by radio and television stations for political advertising, Tex. Elec. Code art. 14.09(B), conflicts with the federal statute regulating such rates, 47 U.S.C. § 315(b), and is therefore preempted.

Appellees are Texas broadcasters regulated and licensed by the Federal Communications Commission (FCC).

Appellees are required to comply with 47 U.S.C. § 315 which regulates the rates at which they can sell advertising to legally qualified candidates for any public office, state or federal. The federal statute requires that for the periods beginning 45 days before the primary election and 60 days before the general election, Appellees charge a rate for political advertising no greater than the lowest unit charge made to other advertisers during the same period. It also prohibits licensees from discriminating against candidates for political office at any time.

Similarly, Texas Election Code art. 14.09(B) makes it a crime for a radio or television station to charge a rate for political advertising that exceeds the lowest unit charge made by the station to other advertisers "for the same class, condition and amount of

time." However, the Texas statute, unlike the federal law, is not limited to specified time periods before elections, but applies to all times.

I. CONGRESS' POWER TO REGULATE BROADCAST LICENSEES INCLUDES THE POWER TO REGULATE THE CHARGES THOSE LICENSEES MAKE FOR POLITICAL ADVERTISING ASSOCIATED WITH STATE AND LOCAL ELECTIONS.

Appellant contends that Congress is barred by the Tenth Amendment from regulating the charges federally licensed broadcast stations make for political advertising associated with state and local elections. That argument was not presented to the district court or to the Court of Appeals and neither court expressly passed on the issue. The issue was not timely or properly raised and, therefore, the appeal should be dismissed. U.S. Sup. Ct. Rule 16.1(b).

Appellant's argument fails on the merits as well.

Appellant does not argue that the broadcast of political advertising by federally licensed radio and television stations does not affect interstate commerce. Instead, Appellant argues that Congress is prohibited by the Tenth Amendment from regulating broadcasters in this manner. Appellant claims that the regulation imposed by 47 U.S.C. § 315(b) on radio and television stations interferes with the State's sovereign right to regulate its own elections.

The requirement imposed by 47 U.S.C. § 315(b) on federally licensed radio and television stations is a part of a comprehensive set of regulations imposing duties and obligations on those persons holding licenses from the Federal Comunications Commission to operate such stations. It does not purport to regulate a state's conduct of its own

elections. It regulates licensed broadcasters, not states.

This Court held in Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264 (1981) that the threshold inquiry concerning a state's Tenth Amendment claim is whether the challenged regulation regulates the "states as states." Again, 47 U.S.C. § 315(b) regulates licensed broadcasters, not states; Appellant's argument does not cross this threshold.

II. CONGRESSIONAL REGULATION OF BROADCAST LICENSEES' RATES FOR POLITICAL ADVERTISING PREEMPTS STATE REGULATION OF THOSE RATES.

The Court of Appeals' conclusion that 47 U.S.C. § 315(b) preempts Texas Election Code art. 14.09(B)(1) properly applies recognized preemption principles. Appellant's challenge to that decision does not raise a substantial federal question and should be dismissed.

The Texas statute is unique in that it carves out for special regulation persons who operate pursuant to and in accordance with federally granted licenses. Unlike statutes regulating misleading advertising or the like and which affect broadcasters along with everybody else, Article 14.09(B)(1) is an effort by Texas to place a special economic burden on federal licensees. Moreover, the Texas statute deals with an area of regulation Congress has carefully considered and provided carefully tailored rules to control.

Congress fully considered the extent of the obligations it was imposing on its federal licensees, and the legislative history of the Act clearly shows that Congress rejected the broader burden that the Texas Act imposes. S. Conf. Rep. No. 580, 92d Cong., 1st Sess. (1970), reprinted in 1972 U.S. Code Cong.

& Ad. News 1866, 1867. Congress struck a balance between the economic burden on its licensees and its desire to control the cost of political campaigns. Congress decided that the licensees should be required to subsidize political speech, but only for specified periods before elections and only when the election involved candidates and not referenda on political issues.

The Texas Legislature has attempted to impose on federally licensed broadcasters an additional financial burden that Congress considered and rejected. The Court of Appeals noted that Congress specifically concluded that it should limit the length of time when the favored rate would be available as an incentive to candidates to shorten the duration of their campaigns. See Appendix at p. A-31, 32.

The Court of Appeals recognized the enforcement of the Texas statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). See Appendix at A-33, 34. And since the Texas statute is directed particularly at broadcasters, it intrudes into an area where there is a pervasive scheme of federal regulation and where Congress and the State Legislature have addressed the same problem. Fidelity Federal Savings & Loan Ass'n v. De La Cuesta, ___ U.S. ___ (1982); Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Com., ____ U.S. ____ (April 21, 1983, 511 U.S.L.W. 4449). There is no substantial question that the Texas statute has been preempted.

III. THE TEXAS STATUTE IS AN UNCONSTITUTIONAL INFRINGEMENT OF APPELLEES' FIRST AND FOURTEENTH AMENDMENT RIGHTS.

Although it was unnecessary for the Court of Appeals to address the issue, it is clear that Article 14.09(B) is a violation of Appellees' rights guaranteed by the First and Fourteenth Amendments. The statute requires Appellees either to forego broadcasting political advertising or to subsidize that advertising. This Court has held that the First and Fourteenth Amendments prohibit a state from requiring a newspaper to publish free political advertising. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). The Florida statute before the Court in Tornillo "exact[ed] a penalty on the basis of the content of a newspaper." The Texas statute has the same effect.

Governmental restraints on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations. Grosjean v. American Press Co., 297 U.S. 233, 244-245 (1936). See Gore Newspaper Co. v. Shevin, 397 F. Supp. 1253 (S.D. Fla. 1975) aff'd on basis of district court opinion, 550 F.2d 1057 (5th Cir. 1977).

Congress may have the authority to require its licensees to provide access to the airwaves to political candidates and require conduct by licensees that would, if there were no special need for a federal licensing system,[1/] violate First Amendment guarantees. But states do not have that kind of special relationship with broadcasters that might support an intrusion into areas protected

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1. See CBS, Inc. v. FCC, 453 U.S. 367 (1981); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

by the First Amendment. The Texas statute violates the First and Fourteenth Amendments and cannot stand.

CONCLUSION

This appeal should be dismissed or the judgment of the Court of Appeals should be summarily affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that three true and correct copies of the foregoing Motion to Dismiss or Affirm have been mailed, certified mail, return receipt requested, to all counsel of record, to-wit: James W. Collins, Esq., Assistant County Attorney, P.O. Box 1748, Austin, Texas 78767, attorney for Margaret Moore, in her official capacity as County Attorney for Travis County, Texas, and David R. Richards, Esq., Executive Assistant Attorney General, State of Texas, P. O. Box 12548, Capitol Station, Austin, Texas 78711, on this the 17th day of November, 1983.

Roger James George, Jr.

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No. 83-640

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF TEXAS,

Appellant,

v.

KVUE-TV, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Fifth Circuit

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF BROADCASTERS IN SUPPORT OF APPELLEES

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF BROADCASTERS IN SUPPORT OF APPELLEES

INTEREST OF THE AMICUS CURIAE

The National Association of Broadcasters (NAB) is a nonprofit incorporated association of radio and television broadcast stations and networks. As of November 16, 1983, NAB's membership included 4,387 radio stations and 700 television stations, some of which are located in Texas, and the major national commercial broadcast networks.

NAB's membership has a clear stake in the outcome of this litigation. Broadcasters are subject to comprehensive

regulation in the area of political advertising under Section 315(b) of the Communications Act of 1934.[1] The State regulation at issue here, Article 14.09(B) of the Texas Election Code,[2] conflicts substantially with the federal rate regulation statute. Whereas the federal law requires broadcasters to provide their lowest unit rates to legally qualified candidates during an election period, the Texas statute makes the lowest unit rate available year-round to "political issue" advertisers as well as to candidates. Moreover, the Texas statute conflicts with the Congressional purposes underlying the federal law.

If Article 14.09(B) is permitted to stand, Texas broadcasters would then be subject to conflicting regulations, and consequently would be less able to fulfill their public interest obligations.

CONSENT OF THE PARTIES

All parties have consented to the filing of this brief amicus curiae.

I. THE TEXAS STATUTE PRESCRIBING RATES FOR POLITICAL ADVERTISING ON BROADCAST STATIONS CONFLICTS WITH BOTH THE LETTER AND UNDERLYING PURPOSES OF THE FEDERAL RATE REGULATION STATUTE AND IS THEREFORE PREEMPTED.

Appellant argues that Congress did not intend the lowest unit rate provisions of Section 315(b) of the Communications Act[3] to preempt state regulation of political broadcast rates. This claim was soundly dismissed by the Court of Appeals for the Fifth Circuit. The Court of Appeals found implied preemption, on the basis

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[1] Communications Act of 1934, as amended, 47 U.S.C. § 315(b) (1972).

[2] Tex. Elec. Code art. 14.09(B).

[3] 47 U.S.C. § 315(b).

that Article 14.09(B) of the Texas Election Code "stands as an obstacle to the achievement of Congress' purpose in enacting the rate regulation statute." [4]

As the Court of Appeals recognized, Congress' purpose in enacting section 315(b) was twofold. First, Congress sought to provide candidates for public office with better access to the broadcast media in order to "more fully and completely inform" the electorate.[5] Second, Congress sought to limit the "spiraling cost" of campaigning.[6] Indeed, Congress purposefully limited the availability of the lowest unit rate in order to create an "incentive to candidates to shorten the duration of their campaigns, thereby helping to reduce campaign costs." [7]

The court below correctly found that the Texas statute conflicts with these Congressional goals. By making the lowest unit rate a year-round rule, Article 14.09(B) lengthens campaign periods and encourages "greater rather than lesser spending." [8] In addition, by requiring broadcast stations to effectively subsidize the lengthy media campaigns of purchasers of "political issue" advertising as well as of candidates, Article 14.09(B) creates a disincentive to the sale of broadcast time for political advertising. In turn, the Texas statute both restricts the viability of broadcasting as a forum for robust discussion of political issues, and impedes rather than promotes the access of candidates to the broadcast media.

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[4] *KVUE-TV, Inc. v. Moore*, 709 F.2d 922, 936 (5th Cir. 1983). *See Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1940).

[5] S. Rep. No. 96, 92d Cong., 2d Sess. ——, *reprinted in*, 1972 U.S. Code Cong. & Ad. News 1773, 1774.

[6] *Id.* at 1781.

[7] *Id.*

[8] 709 F.2d at 936.

This Court has consistently held that:

> [W]hen the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs to be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power.[9]

Because the Texas statute stands as an obstacle to the accomplishment and execution of the purposes underlying a valid federal regulation, this Court must affirm the Fifth Circuit's finding of preemption.

An additional ground on which to affirm the court below is that section 315(b) "is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it."[10] The pervasiveness of section 315(b) is manifest in the precision with which it addresses each aspect of political advertising rates. To begin with, section 315(b) is explicit as to whom it applies, namely, "any person who is a legally qualified candidate for *any* public office in connection with his campaign."[11] The language of the statute does not state or imply that broadcast stations should be burdened with the requirement that they afford their lowest unit rate to advertisers of "political issues." The statutory language makes it clear that section 315(b) applies to legally qualified candidates for state and local offices as well as for federal offices.

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[9] *Savage v. Jones*, 225 U.S. 501, 533 (1911). *See Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1940).

[10] *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 230 (1946).

[11] 47 U.S.C. § 315(b) (emphasis added).

In addition to being explicit as to whom it applies, section 315(b) is express as to when broadcast stations must afford their lowest unit rate to candidates—*i.e.*, "during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election." [12] At all other times broadcasters may set their political advertising rates as high as the rates that they have established for "comparable use(s)" of their stations.[13]

In sum, section 315(b) is a comprehensive federal statute, governing the entire area of rate regulation. For that reason the concurrent Texas regulatory scheme is preempted.

Finally, Appellant maintains that the Texas statute does not conflict with Section 315(b) but rather that it "coordinates beautifully" with the federal law.[14] That argument is clearly erroneous. The Texas statute conflicts both with the purposes underlying Section 315(b) and with Congress' intent as to the applicability of that provision. Even assuming arguendo that the two regulatory schemes shared the same goals, as Appellant asserts that they do, Article 14.09(B) would have to yield to the federal rate regulation. This Court has stated:

> The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.[15]

Here, the federal supervision of political advertising rate regulation would be critically undermined if both the federal and state laws were enforced. Thus the Texas regulation must give way to Section 315(b).

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[12] 47 U.S.C. § 315(b)(1).

[13] 47 U.S.C. § 315(b)(2).

[14] Brief for Appellant at 13.

[15] *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

II. THE UNIFORM FEDERAL REGULATION OF POLITICAL ADVERTISING RATES DOES NOT PRECLUDE TEXAS FROM EXERCISING ITS RESERVED POWERS UNDER THE TENTH AMENDMENT AND THEREFORE THE TENTH AMENDMENT IS NOT A DEFENSE TO A FINDING OF PREEMPTION.

Appellant argues that the power to set political advertising rates applicable to state and local candidates is reserved to the states under the Tenth Amendment, and that this power cannot be preempted by federal law.[16] One of the two cases cited by Appellant in support of this argument is *National League of Cities v. Usery*,[17] in which this Court stated that "Congress may not exercise [its] power so as to force directly upon the state its choices as to how essential decisions regarding the conduct of integral governmental affairs are to be made." [18]

What Appellant fails to point out, however, is that the *National League of Cities* opinion carefully distinguished between federal legislation that "directly displaces the states' freedom to structure integral operations in areas of traditional governmental functions," [19] and federal laws which regulate private enterprises such as broadcast stations:

> It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the Nation and of the state in which they reside. It is quite another to uphold a similar exercise of Congressional authority directed not to private citizens but to the States as states.[20]

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[16] Brief of Appellant at 8.

[17] 426 U.S. 833 (1976).

[18] *Id.* at 855.

[19] *Id.* at 852.

[20] *Id.* at 845.

In *National League of Cities*, this Court invalidated the 1970 amendments to the Fair Labor Standards Act, a regulatory scheme far more obtrusive than section 315(b). The amendments would have extended federal minimum wage and maximum hour standards to state and local government employees, thereby displacing directly the judgments of the states and of their political subdivisions as to how their respective coffers should be spent.

By contrast, section 315(b) does not substitute the judgment of Congress for that of state and local governments in an area traditionally regulated by the States. Section 315(b) imposes standards on private businesses in effectuation of Congress' legitimate interest in ensuring that broadcast stations operate in the public interest. It is clear that the instant case does not fall within the ambit of *National League of Cities*.

The other case cited by Appellant, *Oregon v. Mitchell*,[21] is equally unavailing to Appellant's argument. In *Oregon*, this Court invalidated the Voting Rights Act Amendments of 1970 to the extent that they would have lowered the voting age from 21 to 18 in state and local elections. The narrow ruling of *Oregon* was that the power to establish voter qualifications in state and local elections belongs to the States under the Tenth Amendment except to the extent that that power has been specifically limited by amendments to the United States Constitution. Since the instant case does not involve federal usurpation of Texas' power to establish its own voter qualifications, *Oregon* is not controlling here.

Appellant can point to no case decided by this Court which requires the finding that the regulation of political advertising rates is an "integral governmental function" of the States. Moreover, Appellant points to no decision in which this Court has denied the preemptive effect of

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[21] 400 U.S. 112 (1970).

a valid federal law that did not directly displace a state from the exercise of one of its reserved powers.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether it is constitutional, under the Tenth Amendment, for the federal government to preempt a state's regulation of its own political and electoral processes.

2. Whether the Federal Election Campaign Act of 1971 preempts state regulation of advertising rates charged by radio and television stations in connection with state and local candidates and issues.

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INTEREST OF THE AMICI

The *amici* are organizations which represent state and local governments located throughout the United States. *Amici* and their members have a vital interest in legal questions affecting such governments. Constitutional and statutory questions of great importance for the political and electoral processes of state and local governments are presented by this case. *Amici* are therefore submitting this brief to assist the Court in its consideration of the questions raised by this litigation.[1]

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[1] Pursuant to Rule 36, the parties have consented to the filing of this *amicus* brief.

STATEMENT

1. In 1975 the State of Texas enacted the Texas Election Code. Article 14.09 of that code was designed to promote an informed electorate. The article does so in two ways. First, Article 14.09(B) encourages access to the media by preventing radio and television stations from charging more for political advertising than the lowest rates they charge for other advertising. Article 1409 (B) applies year-round, and is applicable whether political advertising concerns a political candidate or a political issue.

Second, Article 14.09(A) requires disclosure of the name and address of the principal or agent contracting for political advertising, and requires the ad to state that it *is* political advertising. Article 1409(A), like 14.09(B), applies whether an ad relates to a political candidate or a political issue.[2]

2. In late 1981 station KVUE (appellee) brought suit challenging Article 14.09. The district court dismissed for lack of standing, but the Court of Appeals for the Fifth Circuit reversed. After finding that KVUE possesses standing, the court struck down the advertising rate provisions of Article 14.09(B) in regard to *all* candidates and issues, be they federal, state or local. It also struck down the disclosure requirements of 14.09(A) in regard to federal candidates and issues.

3. The court's decision was based on alleged preemption of the Texas statute by the Federal Election Campaign Act of 1971 (FECA) or regulations promulgated thereunder. However, the opinion did not discuss the nature or extent of any federal constitutional power under which this asserted preemption might occur. Rather,

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[2] Article 14.09(A) is set forth in footnote 2 of the decision below, Appendix to the Jurisdictional Statement (App.), p. A-11, n.2. Article 14.09(B) appears in footnote 1 of the decision below, App. A-10, n.1, and at page 4 of the Jurisdictional Statement.

it only stated cursorily in a footnote that "Congress' power to regulate radio and television broadcasting arises from the power to regulate commerce among the states." App. A-22, n.25.

4. In regard to the advertising rate provisions of 14.09(B), the court conceded that "neither Congress nor the FCC has taken the position that the advertising rate provisions of [FECA] oust states from regulating the price stations may charge for broadcasting political advertising." App. A-29. But the court nonetheless found across-the-board preemption because of differences between the state and federal laws. Under the state law broadcasters are prohibited year-round from charging more for political advertising than the lowest rates they charge for other advertising, and this prohibition is applicable to candidates and others. But the federal law is applicable only for designated periods of time prior to elections and only to candidates.[3] The narrower protections of the federal law, ruled the court, oust the state law even in connection with the state's own electoral processes, because Congress wanted to shorten the "campaign season" and to lessen campaign costs. This Congressional goal, claimed the court, is hindered by a longer period of low advertising rates and by allowing non-candidates to enjoy such rates.

5. Insofar as the disclosure requirements of Article 14.09(A) are concerned, the court admitted that neither the Federal Election Campaign Act (FECA) nor its legislative history shows any intent to preclude all state regulation of political advertising. The court nonetheless found preemption in regard to federal candidates and issues because of actions of the Federal Elections Commission and the Federal Communications Commission. Those two agencies have issued rules regarding disclosure, and

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[3] The federal prohibition applies only for forty-five days before a primary election and sixty days before a general or special election.

have stated that their rules "'preempt any state statute which attempts to impose additional notices on political advertising by federal candidates or committees.'" App. A-27. The disclosure rules of the federal agencies, said the court, are satisfied by disclosure that a political ad is paid for by a particular candidate or committee. App. A-28, n.50. But the state law requires the additional disclosure of the address of the candidate or committee, and a statement that the ad is a paid political announcement. *Ibid.* Thus preemption. Nor was the state statute saved by the fact that it did not preclude compliance with the federal law, but was complementary to it.

6. The court did allow the disclosure requirements of Article 14.09(A) to continue to govern state and local political processes. The court did so because federal agencies had not sought to preempt state disclosure laws in this regard. The Court thus said: "the FCC does not seek to control sponsorship identification by state candidates or committees. The Texas sponsorship requirement is, therefore, valid to the extent that it regulates such advertising concerning state elections and campaigns." App. A-28.

REASONS FOR GRANTING A PLENARY HEARING

The decision below gives rise to highly important questions concerning the fundamental authority of states to regulate their own political and electoral processes. It also is contrary to decisions of this Court regarding state authority. For these reasons, a plenary hearing should be granted.

1. The use of radio and television for presentation of views on candidates and issues is an integral and essential part of our political and electoral processes. Thus, in *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court remarked the necessity of using the mass media in the political arena. The Court said "[t]he electorate's increasing dependence on television, radio, and other mass media

for news and information has made these expensive modes of communication indispensable instruments of effective political speech." 424 U.S. at 19.

In this case, Texas enacted a law which betters its political and electoral processes by making it less dear for candidates and citizens to use "expensive modes of communications" and by ensuring that sponsorship of political messages is identified. The law promotes the dissemination of political and electoral views and informaiton, and thereby supports and promotes vital First Amendment values.

The crucial advertising rate provisions of this law have been entirely struck down, however: they have been held preempted even as regards the state's own elections and issues. The decision below thus prevents the state from regulating and seeking to better its own processes by promoting the dissemination of information on state and local candidates and issues. Such a decision raises the fundamental question of whether it is constitutional for the federal government to preclude a state from controlling and improving its own political process. *Amici* believe such federal action is *not* constitutional.[4]

2. The authority to regulate its own political processes is a fundamental attribute of each state's sovereignty.

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[4] Texas has not appealed those portions of the decision below which hold its advertising rate and sponsorship identification requirements preempted in regard to *federal* elections and issues. Thus, *amici* will not comment upon those aspects of the decision.

Insofar as the application of the sponsorship identification requirements to state and local elections is concerned, the decision below went in favor of Texas and will not be before this Court unless the matter is raised on cross appeal. *Amici*, however, find it disturbing that the court below upheld the application of those requirements to state candidates and issues only because a federal agency had not sought to preempt such application. Such grudging recognition of state authority bespeaks a jurisprudential view at war with the constitutional power of states to regulate their own political and electoral processes.

Thus, in announcing the Court's judgment that the federal government could not overrule state laws establishing the age for voting in state and local elections, Justice Black said in *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970):

> No function is more essential to the separate and independent existence of the states and their governments than the power to determine . . . qualifications of their own voters . . . and the nature of their own machinery for filling local public offices.

Subsequent to *Oregon v. Mitchell*, in a line of cases beginning with *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court ruled that the Tenth Amendment protects states against exercises of federal power that threaten "functions essential to [the] separate and independent existence" of states, *National League of Cities* at 845, or a "state government's ability to fulfill its role in the Union." *United Transportation Union v. Long Island R.R.*, 455 U.S. 678, 688 (1982). The Court said it "has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or regulate interstate commerce . . ." *National League of Cities* at 842.

Under *National League of Cities* and its progeny the Court has made clear that there are numerous aspects of state sovereignty which receive Tenth Amendment protection. Such sovereign matters include fire protection, police protection, schools, public health, sanitation, and parks and recreation. *National League of Cities* at 851. Another highly fundamental matter of state sovereignty which necessarily receives Tenth Amendment protection is the right of states to regulate their own political and electoral processes. The necessity of protection for this crucial right is a basic lesson of *Oregon v. Mitchell*, *supra*. See also, *Coyle v. Oklahoma*, 221 U.S. 503 (1911). Protection is also required because the right to regulate

their own political processes is vital to the states' "separate and independent existence" and to their "ability to fulfill [their] role in the Union."

The decision below thus contravenes the Tenth Amendment because it allows federal encroachment upon the fundamental sovereign right of Texas to control and improve its own political processes. Moreover, it stifles Texas' effort to promote first amendment values by increasing the dissemination of information, and prevents the state from "serv[ing] as a laboratory" for efforts to cope with the vast power and influence of broadcast media in the political process. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The stifling of these creative state efforts reinforces the basic illegality of the federal infringement upon the state's prerogative of controlling its own political and electoral processes.[5]

3. The foregoing shows that, as interpreted and applied by the court of appeals, the provisions of FECA are unlawful because they impair the constitutional authority of Texas and are contrary to decisions of this Court. In such circumstances it would have been appropriate for the lower court to construe FECA in a manner that preserves its constitutionality by avoiding preemption of basic state prerogatives. A reasonable, non-preemptive interpretation is readily available, and indeed is mandated by provisions of the federal law.

The lower court admitted, of course, that "neither Congress nor the FCC has taken the position that the advertising rate provisions of [FECA] oust states from regu-

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[5] As noted earlier, the court below did not discuss any constitutional basis for the federal action, but merely made the cursory statement that Congress can regulate radio and television under its interstate commerce power. *National League of Cities*, however, makes clear that Congress' power under the interstate commerce clause does not enable it to infringe vital state functions.

lating the price stations may charge for broadcasting political advertising." App. A-29. This concession is in itself an indication that FECA did not preempt state regulation of advertising rates charged in connection with state and local candidates and issues. Beyond this, however, FECA expressly states only that its provisions have preemptive effect with regard to *federal* office. It provides, 2 U.S.C. § 453:

> The provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of state law with respect to election to Federal office.

The Act does *not* say its provisions "preempt any provision of State law with respect to election to Federal *or state* office." Yet Congress surely knew how to say the latter if it had intended such preemption. The lack of the easily made statement demonstrates the lack of preemption.[6]

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[6] The lower court's opinion seeks to elide the difficulties in its position by arguing that the Texas law will give rise to problems or situations which Congress sought to avoid, such as longer "campaign seasons" or greater campaign spending, and may discourage stations from permitting non-federal candidates to advertise. The lower court's assessment of the merits of the situation is plainly debatable, and it is apparent on its face that the Texas legislature takes a different view of the situation than did the court below. Under the Constitution, of course, it is for Texas, not the lower court or Congress, to determine what rules should apply to the state's political and electoral processes in this situation, and to assess the merits of competing views of the effect of differing rules on such matters as length of campaigns, amounts of money spent, and access to the electronic media. Nor does it appear that Congress intended to encroach upon Texas' constitutional prerogative through preemption; as said above, the lower court's finding of preemption is erroneous.

CONCLUSION

As interpreted by the court of appeals, the provisions of FECA infringe the basic constitutional authority of Texas to regulate and improve its own political and electoral processes, and are in conflict with decisions of this Court. Also, the decision below appears incorrect in its analysis of whether FECA in fact preempts the Texas law. The questions raised by the lower court's opinion are of great importance, and this Court should grant a plenary hearing to address them.[7]

Respectfully submitted,

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Dated: November 1983

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[7] We note that no problem of standing impedes this appeal. The lower court correctly ruled that KVUE had standing because it had obtained diminished revenue under the statute and, in the absence of decision, would in future either obtain diminished revenue or face the possibility of prosecution. Moreover, now that the lower court's decision has been rendered, a decision by this Court is essential lest the state's law be unenforceable. The law is a criminal statute and, failing reversal by this Court, future defendants could successfully argue that because of the lower court's decision they did not have fair notice that their conduct could be criminally punished.

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No. 83-640

In the Supreme Court of the United States

OCTOBER TERM, 1983

THE STATE OF TEXAS, APPELLANT

v.

KVUE-TV, INC., ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a state statute that regulates the rates that broadcast stations within the state may charge for political advertising is preempted by the Communications Act of 1934, 47 U.S.C. 151 *et seq.*

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. In the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, Congress exercised its authority over interstate commerce by establishing a system of broadcast regulation. Congress concluded that some form of government control was necessary; otherwise, it was thought, "the [broadcast] medium would be of little use because of the cacaphony of competing voices, none of which could be clearly and predictably heard." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 376 (1969). See *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 210-213 (1943). Accordingly, Congress created the Federal Communications Commission and prohibited the use of radio frequencies except

under license issued by the Commission (47 U.S.C. 301). The Communications Act specifically recognizes, however, that "broadcasters are not common carriers and are not to be dealt with as such." *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 474 (1940) (citing 47 U.S.C. 153(h)). Instead, under the statutory scheme, "the field of broadcasting is one of free competition" and does not involve "the regulation of rates and charges," which is unnecessary where "free competition is to be permitted." *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. at 474-475.

Since 1952, Congress has maintained a narrow exception to the policy against regulation of broadcast advertising rates. As originally adopted, the exception prohibited broadcasters from charging political candidates, whether for federal, state or local office,[1] higher rates than they charge other advertisers "for comparable use of such station."[2] "This 'comparable use' provision was designed to protect candidates from discriminatory rates." *Hernstadt* v. *FCC*, 677 F.2d 893, 895 (D.C. Cir. 1980) (footnote omitted). In its present form, the exception continues to apply the "comparable use" requirement at all times other than

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[1]In subsequent enactments, Congress has continued to apply its legislation regulating the rates broadcasters may charge for candidate advertising "to all legally qualified candidates for public office, and not merely Federal candidates" (J.S. App. A29-A30, quoting *In re Public Notice Concerning Licensee Responsibility Under Amendments to the Communications Act Made by the Federal Election Campaign Act of 1971*, 47 F.C.C. 2d 516, 518 (1974) (court's emphasis deleted)). However, when Congress granted a new, affirmative right of access to broadcast air time for individual candidates, it limited this right to "legally qualified candidate[s] for Federal elective office." 47 U.S.C. 312(a)(7); see *CBS, Inc.* v. *FCC*, 453 U.S. 367, 378-379 (1981); *Hernstadt* v. *FCC*, 677 F.2d 893, 903, 904-905 n.29 (D.C. Cir. 1980).

[2]Communications Act Amendments of 1952, ch. 879, § 11, 66 Stat. 717 (amending Section 315 of the Communications Act of 1934).

the period immediately prior to a primary or a general election. 47 U.S.C. 315(b)(2). During this period, which the statute defines as "forty-five days" before a primary election and "sixty days [before] a general or special election," broadcasters who sell time to political candidates must not charge more than "the lowest unit charge of the station for the same class and amount of time for the same period." 47 U.S.C. 315(b)(1).[3]

2. The present case involves a challenge to a statute enacted by the State of Texas in an effort to impose its own regulatory regime with respect to the rates broadcast stations may charge for "political advertising" (J.S. App. F1-F3). Whereas Congress has required broadcasters to offer "lowest unit charge" rates only during the 45 or 60 day period immediately prior to a primary or general election, the Texas statute requires radio and television stations located within the State to offer "lowest unit charge" rates for political advertising at all times (J.S. App. A33, F2). Moreover, although Congress has sought to regulate broadcast advertising rates only when political candidates or their campaign committees purchase broadcast time for the candidate's use,[4] the Texas statute seeks to regulate the rates for all "political advertising," as broadly defined to include

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[3]The difference between "comparable use" and "lowest unit charge" is illustrated by the following example. A candidate desires to buy time on a station that offers a volume discount for the purchase of many advertisements, but the candidate wishes to purchase only a single spot announcement. Under "comparable use" rates, the candidate would be entitled to a volume discount only when he or she purchased in bulk, but under "lowest unit charge" rates, the candidate receives the benefit of the volume discount offered a bulk purchaser even though the candidate is not buying in bulk. See *Hernstadt* v. *FCC*, 677 F.2d at 895, 898, 900; *In re Request by Station WBGR*, 58 F.C.C. 2d 980 (1976). See also J.S. App. A31.

[4]J.S. App. A32 (citing *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 F.C.C. 2d 510, 529 (1972)).

broadcasts not only by candidates, but also by the supporters or opponents of a political office holder or candidate, as well as broadcasts favoring or opposing "any measure submitted to a vote of the people" (J.S. App. F1; see *id.* at A33).

3. Appellee KVUE-TV, Inc., a television station licensed to Austin, Texas, filed suit for declaratory relief in the United States District Court for the Western District of Texas challenging the constitutionality of the Texas statute on the ground, inter alia, that it violates the Supremacy Clause insofar as it seeks to prescribe the rates radio and television stations may charge political advertisers.[5] The district court dismissed the challenge to Texas' rate regulation of political advertising on grounds of lack of standing and abstention (J.S. App. C1-C21).

The court of appeals reversed (J.S. App. A1-A35). The court first held that appellee had been injured by the statute and thus had standing to challenge it (*id.* at A12-A20). The court also concluded that abstention was inappropriate here because it viewed the question as "whether, regardless which construction of the statute the state may adopt, the federal statute and regulations prevent Texas from legislating in this field" (*id.* at A22).

On the merits, the court of appeals held that Texas' attempt to regulate broadcaster rates for political advertising is preempted "because it conflicts directly with federal law" (J.S. App. A10). Specifically, the court observed (*id.* at A33) that the State's imposition of the lowest unit charge

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[5]Appellee also challenged the constitutionality of another provision of the Texas statute that requires sponsors of political advertising to identify themselves. The court of appeals held this provision invalid with respect to federal candidates or committees, but upheld Texas' authority to apply its sponsorship identification requirement to advertisements concerning state elections and campaigns (J.S. App. A28). These rulings are not challenged here.

rate on "all political advertising" over broadcast stations and not simply on broadcasts by candidates, as well as its requirement that this rate be charged at all times and not only in the 45 or 60 day period before a primary or general election, places a "considerably heavier burden on broadcasters" that choose to make time available to political advertisers than does Section 315(b) of the Communications Act, 47 U.S.C. 315(b).[6] To the extent that broadcasters might seek to avoid this burden by decreasing the amount of advertising time they would otherwise be prepared to sell for political advertising, this would "directly thwart Congress' intent in passing § 315(b)(1) to give candidates greater * * * access to the broadcast media" (J.S. App. A33-A34 & n.65). For these and other reasons, the court held that the State's rate regulation statute was "an obstacle to the achievement of Congress' purpose[s] in enacting [its] rate regulation statute" and thus the Texas statute was invalid under the Supremacy Clause (J.S. App. A33; see *id.* at A22 & n.24).

DISCUSSION

The question presented in this case is whether Article 14.09(B) of the Texas Election Code (*reprinted in* J.S. App. F1-F3), which regulates the rates that broadcasters within the State may charge for political advertising, is preempted by federal law. In *Silkwood* v. *Kerr-McGee Corp.*, No. 81-2159 (Jan. 11, 1984), slip op. 9 (citations omitted), this Court recently observed that

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[6]The court of appeals noted that one of the reasons Congress selected the lowest unit rate "was to avoid the possibly devastating economic impact on small stations of a fixed discount for political advertising" (J.S. App. A33 n.64). In the court's view, the Texas statute at issue "certainly conflicts with this purpose because it imposes a year-round discount instead of the limited discount Congress enacted" (*ibid.*).

> state law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. * * * If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, * * * or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress * * *.

See *Pacific Gas & Electric Co.* v. *State Energy Resources Commission*, No. 81-1945 (Apr. 20, 1983), slip op. 11; *Fidelity Federal Savings & Loan Association* v. *de la Cuesta*, 458 U.S. 141, 153 (1982). The Texas statute at issue here seeks to regulate the rates that federally licensed broadcast stations may charge for certain types of advertising. We submit that the statute is preempted because it frustrates the achievement of Congress' purposes with respect to the broadcast regulatory scheme in general, and Section 315 of the Communications Act (47 U.S.C. 315) in particular.

1. The Court on numerous occasions has discussed the history of broadcast regulation. See, *e.g.*, *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 103-114 (1973) (hereinafter *CBS, Inc.* v. *DNC*). Although Congress found it necessary to subject broadcasting to federal regulation to avoid having the medium degenerate to the point where there was only a "cacaphony of competing voices, none of which could be clearly and predictably heard" (*Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. at 376), Congress emphatically rejected proposals that would have subjected broadcasters' advertising rates to regulation. See *CBS, Inc.* v. *DNC*, 412 U.S. at 105-109.

The legislative history of the Radio Act of 1927, ch. 169, 44 Stat. 1162 *et seq.*, shows that the Senate Committee bill contained the following provision:

> If any licensee shall permit a broadcasting station to be used * * * by a candidate or candidates for any public office, *or for the discussion of any question affecting the public,* he shall make no discrimination as to the use of such broadcasting station, *and with respect to said matters the licensee shall be deemed a common carrier in interstate commerce.* * * *

67 Cong. Rec. 12503 (1926) (emphasis added). When the bill came to the Senate floor, Senator Dill, the principal architect of the Radio Act of 1927, offered an amendment to eliminate both the common carrier obligation and the requirement of nondiscrimination with respect to the discussion of public issues.[7] See *CBS, Inc.* v. *DNC,* 412 U.S. at 106.[8] Several Senators objected to the Dill amendment, claiming that, unless rates were regulated, only the wealthy would be able to utilize radio,[9] and that, unless the

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[7]The nondiscrimination requirement in the Committee bill would have applied to rates as well as to access. See 67 Cong. Rec. 12504 (Sen. Heflin).

[8]The pertinent provision of Senator Dill's proposed amendment read as follows (67 Cong. Rec. 12502):

> If any licensee shall permit a broadcasting station to be used by a candidate or candidates for any public office, he shall afford equal opportunities to all candidates for such public office in the use of such broadcasting station: *Provided,* That such licensee shall have no power to censor the material broadcast under the provisions of this paragraph and shall not be liable to criminal or civil action by reason of any uncensored utterances thus broadcast.

A separate provision of Senator Dill's proposed amendment would have prohibited discrimination by broadcasters in advertising rates with respect to all advertising, political and nonpolitical 67 Cong. Rec. 12501-12502. This provision was not enacted.

[9]Senator Heflin stated (67 Cong. Rec. 12504):

> It is very necessary that somebody should control the charge. If we do not provide that some one shall have authority to say to some extent how much shall be charged, only the rich can afford to use the radio. The fees can be fixed so high that the poor man will not be able to use it.

nondiscrimination requirement also covered public questions, a great potential would exist for the monopolistic domination of information on issues of public importance.[10] Despite these objections, the Senate adopted

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[10]Thus, Senator Howell argued (67 Cong. Rec. 12504):

> We are not trying merely to place the privilege of broadcasting within the reach of all so far as cost is concerned, but we want to place it within the reach of all for the discussion of public questions when one side or the other is allowed to be presented.
>
> • • • • •
>
> Mr. President, if all candidates can not be heard, none should be heard. If both sides of a question can not be heard over a particular radio station, none should be heard. I can not emphasize this too strongly. It is a matter of tremendous importance, because every day radio is reaching more and more homes, and there are great interests in this country—for instance, the General Electric Co., which can thus enter nearly every equipped home in the United States with their radio stations. They have them hooked up so that one station receives what another sends out. Moreover, the General Electric Co. and the Radio Corporation of America have been afforded the most powerful stations in the United States. • • • Are we going to allow these great interests to utilize their stations to disseminate the kind of publicity only of which they approve and leave no opportunity for the other side of public questions to reach the same audience?
>
> The Senator from Washington has left in the bill a provision respecting candidates. It is important, but it has not anything like the importance of the provision he has stricken out—the discussion of public questions.

Senator Dill responded to this concern by stating (67 Cong. Rec. 12504):

> [Public questions] is such a general term that there is probably no question of any interest whatsoever that could be discussed but that the other side of it could demand time; and thus a radio station would be placed in the position that the Senator from Iowa mentions about candidates, namely, that they would have to give all their time to that kind of discussion, or no public question could be discussed.

See *CBS, Inc.* v. *DNC*, 412 U.S. at 106-107.

Senator Dill's amendment. See *CBS, Inc.* v. *DNC*, 412 U.S. at 107.

"The provision finally enacted, § 18 of the Radio Act of 1927, 44 Stat. 1170, was later re-enacted as § 315(a) of the Communications Act of 1934, but only after Congress rejected another proposal that would have imposed a limited obligation on broadcasters to turn over their microphones to persons wishing to speak out on certain public issues." *CBS, Inc.* v. *DNC*, 412 U.S. at 107-108 (footnotes omitted). In 1934, Congress also rejected a proposal that would have limited the rates that could be charged for advertising by a candidate, by a supporter of a candidate, or by a proponent of one side of a public question. See *id.* at 108 n.4.[11] "Instead, Congress after prolonged consideration

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[11]Section 315 of the Senate bill (S.2910, 73d Cong., 2d Sess. (1934)) stated that:

> (a) • • • [I]f any licensee shall permit any person to use a broadcasting station in support of or in opposition to any candidate for public office, *or in the presentation of views on a public question to be voted upon at an election, he shall afford equal opportunity to an equal number of other persons to use such station* in support of an opposing candidate for such public office, or to reply to a person who has used such broadcasting station in support of or in opposition to a candidate, *or for the presentation of opposite views on such public questions.*
>
> • • • • •
>
> (c) *The rates charged for the use of any station for any of the purposes set forth in this section shall not exceed the regular rates charged for the use of said station to advertisers furnishing regular programs,* and shall not be discriminatory as between persons using the station for such purposes.

See *Hearings on S. 2910 Before the Senate Comm. on Interstate Commerce*, 73d Cong., 2d Sess. 19 (1934) (emphasis added). The Senate Report explained:

> This section extends the requirement of equality of treatment of political candidates to supporters and opponents of candidates, and public questions before the people for a vote. It also prohibits any increased charge for political speeches. No station owner is

adopted § 3(h), which specifically provides that 'a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.' " *CBS, Inc.* v. *DNC,* 412 U.S. at 108-109 (footnote omitted).

This history shows that in 1927, and again in 1934, Congress considered, but did not adopt, provisions that would have required broadcasters to act as common carriers vis-a-vis candidates and public questions. Instead, it specifically provided only that an equal opportunity was to be granted to candidates once their opponents had been permitted to use a facility. Nor did Congress choose in either case to regulate the rates that could be charged for candidate advertising. In short, Congress was careful not to grant "the Commission powers of control over the rates" broadcasters could charge advertisers, in sharp contrast "to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity" subject to federal "regulation of rates and charges." *FCC* v. *Sanders Brothers Radio Station,* 309 U.S. at 474, 476.

Congress, of course, can create exceptions to its policy which makes "the field of broadcasting * * * one of free competition." *FCC* v. *Sanders Brothers Radio Station,* 309 U.S. at 474. It has done that in the case of the rates that stations may charge political candidates and their campaign committees for broadcasts by the candidate. 47 U.S.C. 315(b). See J.S. App. A25-A26, A32 & n.63. But, absent

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required to permit the use of his station for any of these purposes but *if a station permits* one candidate or *the supporters or opponents* of a candidate, or *of a public question upon which the people are to vote, to use its facilities, then there is the requirement of equality of treatment and that no higher rates than ordinary advertising rates shall be charged.*

S. Rep. 781, 73d Cong., 2d Sess. 8 (1934) (emphasis added). The Senate provision was deleted in Conference. See H.R. Conf. Rep. 1918, 73d Cong., 2d Sess. 26, 49 (1934).

congressional authorization, neither the Commission nor any state may create further exceptions to the deliberately adopted federal statutory policy against regulation of broadcast advertising rates. Because Texas seeks to regulate these rates in a manner not authorized by Congress, its statute is invalid under the Supremacy Clause.[12]

2. The Texas statute also conflicts with Congress's particular purposes in enacting Section 315 of the Communications Act, 47 U.S.C. 315. Section 315 is an important part of "the congressional plan to develop broadcasting as a political outlet." *Farmers Educational & Cooperative Union* v. *WDAY, Inc.*, 360 U.S. 525, 535 (1959). Congress has long been aware of "radio's potential importance as a medium of communication of political ideas [and] sought to foster its broadest possible utilization" to that end. *Id.* at 529. As both the court of appeals and the Commission recognized, Congress intended the "lowest unit charge" provision of Section 315(b)(1) to facilitate access by political candidates "to the broadcast media to explain their stand on issues" (J.S. App. A31 (footnote omitted)). At the same time, however, Congress sought to ensure that any attempt to "lower the rates charged candidates" should avoid "imposing unreasonable and possibly economically devastating burdens on small stations." *Hernstadt* v. *FCC*, 677 F.2d at

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[12]In *Head* v. *New Mexico Board of Examiners*, 374 U.S. 424 (1963), the Court declined to hold that all regulation of broadcast advertising had been preempted, and it accordingly upheld a state statute that prohibited advertisements by optometrists in newspapers and on broadcast stations from quoting the price charged for optometric services. Unlike this case, *Head* did not involve an attempt by a state to regulate the rates that broadcast stations may charge their advertisers, and the Court, in upholding the statute, observed that there was no showing that the state law would " 'frustrate any part of the purpose of the federal legislation.' " 374 U.S. at 432 (quoting *Colorado Anti-Discrimination Commission* v. *Continental Air Lines, Inc.*, 372 U.S. 714, 724 (1963)).

898; see *id.* at 898 n.15 (citing S. Rep. 92-96, 92d Cong., 1st Sess. 27 (1971)); *Federal Election Campaign Act of 1971: Hearings on S. 1, et al., Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 412 (1971) (Sen. Pastore). See also J.S. App. A33 & n.64.

To facilitate candidate access to broadcast stations, without either causing undue financial hardship to licensees or discouraging them from offering to sell time for political discussion,[13] Congress has "carefully circumscribed" the federal requirement for charging "lowest unit charge" rates (J.S. App. A32). First, these rates are required only during the period immediately preceding a primary or general election, which Congress has specifically defined as 45 days before a primary and 60 days before a general election. 47 U.S.C. 315(b)(1).[14] Second, Congress has refrained from

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[13]Licensees are required to sell time in the first instance only to candidates for federal office. 47 U.S.C. 312(a)(7); *CBS, Inc.* v. *FCC*, 453 U.S. at 378-379. Although broadcasters are not required in other circumstances to sell advertising time to individuals or groups wishing to engage in political discussion (*CBS, Inc.* v. *DNC*, 412 U.S. at 94), a licensee may exercise its broad editorial discretion and allow political advertising as one means of "afford[ing a] reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 U.S.C. 315(a); see *Democratic National Committee* v. *FCC*, 717 F.2d 1471, 1473 (D.C. Cir. 1983).

[14]The "lowest unit charge" provision in Section 315(b)(1) was initially included in the Senate bill, and was adopted in conference as part of a compromise between the House and Senate conferees. See H.R. Conf. Rep. 92-752, 92d Cong., 1st Sess. 22 (1971). Several Members of the House objected to the the "lowest unit charge" provision on the ground that it discriminated against the broadcast media. See 118 Cong. Rec. 324 (1972) (Rep. Heinz); *id.* at 325 (Rep. Devine); *id.* at 326 (Rep. Nelsen); *ibid.* (Rep. Keith); *id.* at 327 (Rep. Broyhill); *id.* at 327-328 (Rep. Thompson); *id.* at 330 (Rep. Pickle); *id.* at 332 (Rep. Hillis). In urging passage of the legislation, its supporters emphasized that inclusion of the provision was the product of compromise and that the "lowest unit charge" rate would apply only to the 45-day period preceding a primary election and the 60-day period preceding a general election. See 118 Cong. Rec. 321 (Rep. Springer); *id.* at 322 (Rep. Staggers); *id.* at 330-331 (Rep. Abbitt).

imposing any rate regulation—whether "lowest unit charge" or "comparable use"—on licensees, except when they sell time for broadcasts by candidates (J.S. App. A32 & n.63). Licensees are free to make their own arrangements when they sell time for other forms of political discussion.

The Texas statute under review would effectively nullify the "carefully circumscribed" federal plan insofar as radio and television stations in Texas are concerned. Under the Texas statute, there is no time limit on the applicability of a "lowest unit charge" rate for political advertising; that rate must always be in effect for political advertisements. Moreover, the statute imposes this extremely low rate whenever a licensee sells time for political discussion, not just to candidates or their campaign committees, but to anyone desiring to discuss a candidate, a political party, a public officer or "any measure submitted to a vote of the people" (J.S. App. F1). The court of appeals correctly held that this statute "conflicts directly" with the federal legislative policy because it "imposes a considerably heavier burden on broadcasters to make low-cost time available to political advertisers than does the federal statute," and also because it "may have the effect of limiting rather than increasing candidate access to the media by discouraging stations from making advertising time available to nonfederal candidates at all" (*id.* at A33-A34 (footnotes omitted)).[15]

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[15]Apart from the fact that the state statute on its face is not limited to advertisements in connection with state and local elections, Texas' claim that it is only seeking to regulate such elections cannot save this statute any more than a similar claim would be sufficient to permit a state to compel broadcast stations to sell advertising time to individuals who are candidates for state offices. See *CBS, Inc.* v. *DNC*, 412 U.S. at 94; *CBS, Inc.* v. *FCC*, 453 U.S. at 378-379, 396.

Appellant claims (J.S. 12) that 2 U.S.C. 453, which explicitly "preempt[s] any provision of State law with respect to election to Federal office," supports, by negative implication, its position that Congress meant to preempt the states only with regard to federal

3. Relying on *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), and *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), appellant contends (J.S. 8-11) that Congress may not regulate the rates charged by broadcasters for political advertising with respect to state and local elections because such regulation would interfere with the state's control over its own electoral processes and thus run afoul of the Tenth Amendment. This contention is insubstantial.

Appellant's complaint here is not about any federal policy directed "to the States as States." *National League of Cities* v. *Usery*, 426 U.S. at 845. The policy instead is one that addresses the rates federally licensed broadcast stations may charge when they decide to sell time to advertisers. Under the federal policy, licensees are generally free to charge whatever they please, except in the limited circumstances described in Section 315(b), 47 U.S.C. 315(b). Appellant's claim, that Congress is without authority to regulate federal licensees operating in interstate commerce with respect to their advertising rates, rests on the incorrect assumption "that the Tenth Amendment limits congressional power to pre-empt or displace state regulation of private activities" in interstate commerce. *Hodel* v. *Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 289-290 (1981). As this Court stated in *Hodel*,

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elections, and that the states are therefore free to regulate political advertising rates charged by broadcasters for state and local elections. But Section 453 was not designed to deal with Congress's more comprehensive concern about the regulation of broadcaster rates for advertising. As the Conference Report on Section 453 explained:

> It is clear that the Federal law occupies the field with respect to reporting and disclosure of political contributions to and expenditures by Federal candidates and political committees, but does not affect State laws as to the manner of qualifying as a candidate, or the dates and places of elections.

S. Conf. Rep. 93-1237, 93d Cong., 2d Sess. 100-101 (1974).

however, "[a] wealth of precedent attests to congressional authority to displace or pre-empt state laws regulating private activity affecting interstate commerce when these laws conflict with federal law." *Id.* at 290 (citations omitted).[16]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 1984

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[16]Congress clearly understood the distinction between regulating the practices of federally licensed broadcasters and regulating the electoral process itself. In rejecting a proposal to extend the "lowest unit charge" requirement to nonbroadcast media for state and local elections, the Senate Report stated:

> The Committee feels that Federal jurisdiction over the broadcast media for this purpose rests on its interest in protecting the integrity of Federal elections and its authority to regulate radio and television in the public interest. In the nonbroadcast media, however, the Committee feels this jurisdiction is based only on the former.

S. Rep. 92-96, *supra*, at 29.